Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

Nanette M. Dettlaff, *Petitioner*,

v.

Paul Haddock, Sheryl Haddock
and Susan Callahan, *Respondents*

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Oregon

PETITION FOR A WRIT OF CERTIORARI

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November 5, 2001

114 pp

QUESTIONS PRESENTED

1. Whether Oregon Revised Statutes provision for Statutory Ways of Necessity, ORS 376.105 through ORS 376.145, ORS 376.150 through ORS 376.200 violate petitioner's rights and the Way of Necessity owner's and predecessors and successors in interest rights under the takings clause of the U.S. 5th Amendment ("nor shall private property be taken for public use without just compensation"), for the statutes require petitioner for Way of Necessity to construct and maintain a public use road at their own personal and private expense (**their** private property) without just compensation to petitioner, as well as requiring successors in interest (petitioner for writ) to expend **their** private property of labor and materials in maintenance of a 'public use road' without just compensation.

2. Whether those statutes in question (1) above violate petitioner's rights under the equal protection clause of the U.S. 14th Amendment ("nor deny to any person within its jurisdiction the equal protection of the laws.")

3. Whether the trial court directed verdict, in which the trial court judge substituted his judgment for the judgment of a jury, violates petitioner's U.S. 7th Amendment rights .

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IN THE SUPREME COURT OF THE UNITED STATES

November 5, 2001

NANETTE M. DETTLAFF, *Petitioner*

v.

Paul Haddock, Sheryl Haddock, and
Susan Callahan, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Nanette M. Dettlaff respectfully petitions for a writ of certiorari to review the judgment of the Oregon Supreme Court in this case.

OPINIONS BELOW

The decision without published opinion (review denied) of the Oregon Supreme Court (App., *infra*, a-35) is reported at 332 Or 430. The decision without published opinion (affirmed without opinion) of the Oregon Court of Appeals (App., *infra*, a-34) is reported at 173 Ore. App. 170. The opinions and judgments of the Oregon Trial Court of Douglas County (App., *infra*, a-1 through a-33) are unreported.

JURISDICTION

The Oregon Supreme Court entered its judgment on August 7, 2001. The jurisdiction of this Court is invoked under the 14th Amendment of the U.S. Constitution primarily, and secondarily under 28 U.S.C. § 1257, and is timely (filed within

90 days of the Oregon Supreme Court decision, U.S. S.Ct. Rule 13(1)). Additionally, 28 U.S.C. §2403(b) may apply, and a copy of this petition has been served on the Solicitor General of the State of Oregon, as required by U.S. S.Ct. Rule 29.4(c).

The constitutionality issues herein presented are preserved at all levels of the Oregon courts.

STATUTORY PROVISIONS INVOLVED

Oregon Revised Statutes (hereinafter ORS) creating a Statutory Way of Necessity (hereinafter W.O.N.), ORS 376.105 through 376.145, are the ruling statutes in petitioner's case, repealed in part(App., *infra*, a-74 through a-77).

The current statutes creating a statutory W.O.N. are ORS 376.150 through ORS 376.200 (App., *infra*, a-78 through a-85).

Both sets of statutes provide that the petitioner for W.O.N. solely pay just compensation to servient property owners, solely pay all costs of the petition, solely pay for construction of the roadway , and solely pay for the maintenance of the roadway (and remaining portion of the W.O.N. within the width of the W.O.N. but outside the roadway portion of the W.O.N.).These statutes further provide that all successors in interest (petitioner for writ) solely pay for the maintenance of the statutory W.O.N. roadway (and remaining portion of the W.O.N. within the width of the W.O.N. but outside the roadway portion of the W.O.N.).

STATEMENT

Petitioner, Nanette M. Dettlaff, sued respondents Paul Haddock, Sheryl Haddock, and Susan Callahan in August 1999 in the circuit court of Douglas County, Oregon.She alleged that respondents damaged plaintiff by their logging use of the roadway portion of her W.O.N. with heavy equipment and logging truck use, that logging of timber within and above her W.O.N. created a landslide hazard requiring mitigation., and that their diverting their spring into the W. O.N. roadway culvert increased her maintenance costs. Respondents were owners of one of the servient estates through which plaintiff's W.O.N. passed.

Plaintiff sought declaratory judgment limiting the use of plaintiff's W.O.N. to ingress and egress to plaintiff's property, and sought to recover money damages for defendants' acts.

A jury trial was held before the Honorable Thomas W. Kolberg on August 24, 1999. While the jury was in recess, defendants' motion for a directed verdict was allowed. The opinions and judgments of the circuit court of Douglas County, Oregon (trial court) were as follows:

1. Directed verdict (App., *infra*, a-6 through a-24)
2. Judgment on Injunctive Requests (App., *infra*, a-1,a-2)
3. Judgment on Damages Claims (App., *infra*, a-3,a-4)
4. Supplemental Judgment (App., *infra*, a-5)

The trial court judicial interpretation in the Oregon courts as discussed in the trial court transcript (App., *infra*, a-6 through a-24) and its judgment on injunctive requests (App., *infra*, a-1,a-2) both defined petitioner's W.O.N. as a public use road but denied petitioner's claim for just compensation for HER private property taken for public use.

The directed verdict, expressed in the judgment on damages claims (App., *infra*, a-3,a-4) denied petitioner's right to a jury trial for damages. The Oregon Court of Appeals and the Oregon Supreme Court upheld all of the trial court decisions. (affirmed without opinion, and review denied, respectively)

A. Oregon Statutory Way of Necessity

This case involves the construction of the provisions of the Oregon statutory way of necessity legislation ORS 376.105 et seq.,(App., *infra*, a-74 through a-77)and it's statutes' successor, ORS 376.150 et seq.(App., *infra*, a-78 through 85) These provisions are aided by an understanding of the background of this class of roads.

> "The construction of roads and bridges is a power belonging to all governments, in the exercise of which every citizen or subject is deeply concerned. Works of this nature are indispensable to the prosperity of a country. They must begin with its earliest

> settlement and keep pace with its advancement in population, in commerce and social enjoyment. So intimately are they interwoven with individual enterprise and the public welfare, that their establishment and regulation have hitherto been regarded as an essential branch of internal police; the first to be attended to, and the last to be neglected. ...
>
> Private roads in the settlement of a country are often as necessary for the accommodation of the inhabitants, as those of a public nature. Thoroughfares and highways cannot be made to traverse every part of the territory, so as to reach the dwellings of all who need their use. And what must be the unavoidable result, if the power to lay out private roads under public authority be denied?"
>
> Is not the public interest concerned that they shall have access to our highways and thoroughfares? If it be refused them, how are they to discharge the various duties enjoined by law, or enjoy the privileges which the law was intended to secure to them? With what propriety can they be called on to work upon the highways, to serve in the militia, as jurors, or as public officers, when they cannot leave their possessions without committing a trespass? In what way are they to exercise the elective franchise, or avail themselves of the numerous rights, civil and political, designed by government as the common property of all? A denial of the power in question would operate like a sentence of disfranchisement and out-lawry pronounced against them, though chargeable with nothing save misfortune."(*Taylor v. Porter & Ford,4 Hill 140,; 1843 N.Y. LEXIS 16*)

Statutory Ways of Necessity were the state legislature's solution of the problem of landlocked parcels. This solution was embodied in (ruling) statutes in petitioner's case, ORS 376.105 et seq, and in (current) statutes, ORS 376.150 et seq.

B. Proceedings Below

Petitioner's predecessor in interest, Lee White, petitioned the Douglas County Board of Commissioners for a Statutory Way of Necessity in 1972 (App., *infra*, a-45,a-46) after defendants' predecessor in interest, Harrison, locked White out from using the 'bench road' through defendants' property, as access to Elk Ridge Forest Road (Oregon Department of Forestry (ODF) line 1000 road), which had been the access road for several decades, but was not recorded as an easement on the deeds. When petitioner purchased the White property in 1989 she became his successor in interest.

When defendants' appropriated petitioner's W.O.N. for their logging operations and use in 1997, and logged within her W.O.N., those acts were not uses described in the deeds and instruments of record granting the W.O.N. to petitioner's predecessor in interest, Lee White.(App., *infra*, a-45 through a-55). Both the ruling and current statutes and the deeds define only 'ingress and egress' - and none of defendants acts were for ingress and egress.

Petitioner, whose funds and labor had maintained the W.O.N., believed that her private property remained private property. Therefore, in her suit she sought declaratory judgment of rights and responsibilities as well as damages .

The trial court, however, relying on citations from history supplied by defendants, and relying on the assumptions that (1) a statute is **assumed** constitutional; and (2) the **only test** of constitutionality is **public use**, issued its interpretation in its Judgment on Injunctive Request (App., *infra*, a-1,a-2) which define the road to be open for **public use**, cost and liability responsibility to petitioner, and use shared with the public. Cooperation is the key word - petitioner who pays must cooperate in the use with public persons who don't pay...

The trial court's directed verdict depended upon the court's opinion that the measures for damage were expert witness testimony to the W.O.N. condition before defendants' acts, that a 'probability' figure (number) was required to prove a hazard, and that petitioner had not shown a connection between defendants' acts and the damages claimed both for the roadway and for the landslide hazard claimed.

Petitioner then filed an appeal in the Oregon Court of Appeals, whose decision was 'affirmed without opinion (App., *infra*, a-34); petitioner then filed a petition for review in the Supreme Court of Oregon and her review was denied. (App., *infra*, a-35). Neither court decision refuted petitioner's arguments in her briefs and petition for review that her U.S. 5th, 7th, and 14th amendment rights had been violated by the W.O.N. statutes and by the directed verdict.

REASONS FOR GRANTING THE PETITION

I. The Oregon Supreme Court Decision, the Oregon Court of Appeals Decision and the trial court interpretation of the Statutory Way of Necessity legislation violate petitioner's U.S. 5th and 14th U.S. Constitutional Amendment rights.

The Fifth Amendment of the United States Constitution guarantees the right to just compensation for the taking of private property for public use:

> **"Nor shall any person ...be deprived of ...property without due process of law; nor shall private property be taken for public use without just compensation."**

The Fourteenth Amendment of the United States Constitution guarantees to all citizens that the Oregon Constitution and legislation may not violate their federal rights:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, **nor deny to any person within its jurisdiction the equal protection of the laws."**

The citation history for W.O.N. is given in Appendix N (App., *infra*, a-87 through a-91). Petitioner used the case cited by Judge Kolberg, trial court judge and traced a 'genealogy' of the citations both forward and backward. The case he cited was *Chapman v. Perron, 69 Or App 445, 685 P2d 492, (Or App 1984)* This appendix lists the cases in chronological order and presents a summary table of the salient factors related to this case, namely, who paid compensation, who paid for construction, etc.

It can be seen from this summary table that in 1809, the 'town' paid just compensation and the town paid for road construction. This situation conforms **exactly** to the 'takings clause' requirements of the 5th amendment.

In New Hampshire, erosion of the right is recorded in 1826, for the petitioner now pays compensation, but the town pays for construction.(*Metcalf v. Bingham, 3 N.H. 459 ,1826*)

In 1873, the earliest Oregon case, *Witham v. Osburn, 4 Ore. 318 (1873)*, and since then in Oregon, W.O.N. owner's 5th amendment rights have disappeared, for petitioner pays both just compensation to servient owner(s) and also pays for construction and maintainence of the W.O.N. *Witham v. Osburn* argued for private property nature of the road, based on 'who paid for it', but the court argued that eminent domain doesn't give the government the right to transfer property from A to B. Therefore, the W.O.N. is public use!

On the other hand, the government, scrupulous regarding servient owner's A's 5th amendment rights, ignores the reality that then, if B solely pays A just compensation, B solely pays for the construction of the roadway portion of the W.O.N., and then A uses it 'as a member of the public', then the government has used eminent domain to transfer B's property back to A, without compensation! This is double injury to B. Then, if A damages the road, and B cannot constrain A from use of the road, or collect damages, then this is triple injury to B. Petitioner for writ is B in the this example.

The 'takings' clause of the 5th amendment **has no conditional phrases**. The clause does not say.'...'except when the state does not want to pay for it."

"Nor can the vindication of those rights depend on the expense in doing so." *Watson v. Memphis, 373 U.S. 526, 83 S Ct. 1314 (1963).*

The Oregon W.O.N. statutes are in violation of petitioner's U.S. constitutional 5th amendment rights because

(1) the W.O.N. legislation does not treat petitioner's W.O.N. as private property based on **audit trail of who paid for it.**

(2) the constitutional test the Oregon courts used is a **partial** test of takings clause, namely, that of **public use** only, when there are three other tests, namely "nor shall **'private property', be 'taken', for 'public use','without just compensation'.**

The Oregon W.O.N. statutes are in violation of petitioner's U.S. constitutional 14th amendment rights (equal protection clause) because the W.O.N. legislation does not treat petitioner as a citizen with constitutional rights equal to that of servient owners.

Moreover, the use of language in the eminent domain area of law enters the picture to obfuscate the issue, add expanded dimensions to the controversy, contrive a complexity without parallel - and all of these factors become confused, contradictory, inconsistent, and almost irrational in the heated controversy of private property and the government exercise of eminent domain power as implied by the 'takings' clause of the 5th Amendment or the exercise of 'police power' to take property without compensation....how can this be reconciled?

What happens if there is a police power aspect to the eminent domain 'taking'?

Has there been a condemnation or an inverse condemnation? Is there a public purpose, a public interest, a public need, a public use? What is the definition of public? Is it one stranger ? Is it a certain number of strangers? Is it a certain minimum number of strangers?

Is there a taking? Is a taking an 'event' or can it be an ongoing process?

In the area of eminent domain litigation, there are literally tens of thousands of citations contradicting each other in the meaning, uses and application of words such as public, private, property, use, need, purpose, interest, benefit, right, and privilege. These citations contradict one another, are inconsistent, and somehow forget the mandate of the meaning of the full phrase of the takings clause of the 5th amendment.

Then there is the problem of the constitutional test in the prior judicial rulings in cases of statutory ways of necessity: the state judicial bodies both

1. Assume constitutionality, and
2. Assume that the only test in this case for constitutionality is 'public use.'

Ignored in this test, however, is that private funds have constructed this road, paid just compensation, etc. So what happened to the constitutional test that tests the situation against the WHOLE PHRASE of the 'takings' clause of the 5th Amendment.

How could there be such erosion of clear thinking?

All a private individual, like petitioner, knows is that she is in the position of legislative 'magic' - as soon as she bends her back to hoe, rake, or shovel to maintain her road, presto, **her labor** is **for public use**....**without compensation**...isn't that servitude, against the 13th Amendment...isn't that a 'taking' against petitioner's 5th amendment rights? At what point in the dropping of a piece of gravel or a yard of gravel or 5 yr. of gravel has the gravel magically been transformed from **hers** (the receipt for paying for it is in her pocket) to the **public's** use...without compensation....isn't that a 'taking' against petitioner's 5th amendment rights?

Then, there is the trial judge's explanation that this was a sort of 'quid quo pro' - for a landlocked landowner. So, then the question becomes: are constitutional rights personal or can they be 'waived'? Can they be waived without warning - there is nothing in the deeds of record which gives a kind of 'Miranda' warning, i.e., "you consent to waive your 5th amendment rights under the takings clause if we grant you the statutory W.O.N." Is such a 'restrictive covenant' constitutional? Can a State require that 'if you live here, you give up your 5th amendment rights'? Why, that reasoning would open a huge pandora's box: should I not be able to bargain a right or two, maybe I would rather be paid just compensation and give up the 'right to be silent.'...Why there would be no end to this.

Additionally, petitioner is liable for the W.O.N.

according to the Oregon Statutes 376.105 et seq.. So, petitioner and successors in interest are in an interesting bind: not only is the 'landslide hazard (covered in next section II below) not mitigated and they **must** travel past it for ingress and egress, but now if the public is hurt in a landslide...? Owners of W.O.N. therefore have all of the cost, all of the responsibility and liability, but only a piece of the use. The 'public', however, have none of the cost, none of the responsibility, and have use whenever and how often they wish. How can that be a just and equitable situation? Isn't this situation exactly what the 5th amendment was supposed to prevent?

II. The Oregon Supreme Court Decision, the Oregon Court of Appeals Decision and the trial court directed verdict violate petitioner's U.S. 7th Constitutional Amendment rights

> The Seventh Amendment of the United States Constitution guarantees the right to trial by jury:
>
> **"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."**

The phrase 'the right of trial by jury shall be preserved' has no qualifying or exception phrases. This clause does not say 'the right of trial by jury shall be preserved except by directed verdict. Nor does the right of jury clause state any limitations on evidence. It just plain says that the right of trial by jury shall be preserved. This right is not preserved by directed verdict rulings.

Defendants' acts related to petitioner's private property W.O.N. included :

1. Willful damaging trespass by logging within petitioner's W.O.N. and deriving private profit for their removal;

2.Crushing the foundation of the 100 ft. portion of the roadway portion of petitioner's W.O.N. by placing an 80,000 logging truck on her W.O.N. graveled roadway built for light vehicular traffic.(It was not built as a logging road. Logging roads, built to BLM standards are more expensive to build. (App., *infra*, a-56).Defendants loaded logging trucks weighed 80,000 lb. placing almost 8 times the bearing load on her W.O.N.;

3.Creating a landslide hazard through their acts of clearcutting within and above a fragile steep section of petitioner's W.O.N.;

4.Redirecting their spring water in W.O.N. culvert, thus increasing the maintenance of petitioner's W.O.N.;

5.Use of petitioner's W.O.N. at petitioner's and her predecessor in interest's capitalization expense for their private profit, since the uses have been expanded from ingress and egress to 'access', which includes access to servient properties.

Additionally, the context of suing for damages ties this issue into the ownership issue described in the preceding section, section I. This adds to the confusion and contradiction: how can I sue if it is not my private property? If it is my private property, should not the context be damaging trespass, and since just compensation paid by petitioner's predecessor in interest, Lee White, included the value of the timber/trees within the W.O.N.(App., *infra*, a-52 through a-55), the defendants' logged the trees, put the money in the bank?, and the court ruled early on (amended complaint forced by the trial judge to continue the suit) that the servient property still owned the timber!)

In Oregon, there are treble damages for removal of trees (ORS 105.810) from private property, and defendants clearcut the trees within petitioner's W.O.N. However, if it is public property for public use shouldn't the government be suing defendants? How can it be private property for public use without violating the 5th amendment?

Defendants clearcutting damage (increased potential for landslide hazard) to petitioner's W.O.N. was presented by testimony of her expert witness, Dr. Spigolon, now deceased, by his report, trial EX-11(App., *infra*, a-36 through a-44), and trial presentation, EX-73, which explained damage to roadways by excessive loading and increased landslide hazard created by defendants' clearcut logging within and above her W.O.N. He explained the three hazard criteria for landslides: slope over 70°, soil type clayey,etc., geographical location Tyee formation. (App., *infra*, a-37 through a-39)

Subsequent to the trial, scientists published the results of a 10-year study of effects of clearcutting on landslides, *Montgomery, D. et al, "Forest Clearing and regional landsliding", Geology, April 2000* (App., *infra*,a-58 through a-73), near petitioner's property (within 30 miles), with slope, geology and soils nearly identical to those characterizing petitioner's W.O.N. This study verifies that clearcutting on slopes like petitioner's, soils like petitioners's, same geological formation as petitioner's dramatically increased potential for landslides, thus verifying Dr. Spigolon's testimony of increased susceptibility of landslide hazard and loss under conditions created by defendants' clearcutting acts within and above petitioner's W.O.N., based upon empirical evidence.

After the intense storm events of 1996, resulting in over 100 slides, and a number of deaths, the Oregon legislature and the Oregon Dept. of Forestry (ODF) reviewed the situation. Today, Oregon's own legislation (Chapter 1103 Oregon Laws 1999, Session Law, AN ACT, SB12) acknowledges that clearcutting forest practices may significantly increase landslide hazards, (ORS 527.710) acknowledges hazards created by clearcut logging practices. The ODF defines the **scientific criteria for identification of high risk sites** in "Forest Practices Technical Note Number 2", available online at:

(http://www.odf.state.or.us/fp/reflibrary/refslist.htm)

These criteria match petitioner's expert witness Dr. Spigolon's report and Montgomery et al's article.

Once clearcut, however, the site with a high risk hazard for a landslide can only be mitigated, which is what Dr. Spigolon's report contained.

Mitigation of this hazard, with estimated cost to implement of $20,000 - $50,000 (not including design and engineering costs to implement), to restore the stability of the clearcut section of W.O.N. to the condition of stability existing before defendants' clearcut acts, which the jury could understand if they had been allowed to read the report instead of being dismissed, was denied to petitioner in the directed verdict, because the trial judge did not read the entire report and conditioned his verdict not on empirical science but on naming a 'probability', a condition not applicable in this situation. Further, denial of admission of valid evidence (App., *infra*, a-56,a-57) prevented petitioner from using this cost breakdown by a road contractor as an 'equation' to compute costs for road rebuilding, again because 'he wasn't present to know the situation before defendants' acts.", a false condition for denying evidence of this nature.

How is it that the science of the ODF forestry note (2) **states the same scientific basis for landslide hazard** as petitioner's expert witness, Dr. Spigolon (App., infra, a-36 through a-44; deceased 3/12/2001) did the but the court decided that science doesn't defind hazard that needs to be mitigated, not because her science is wrong, but because her expert witness didn't view the property before defendants' acts.!..yet defendants gave no real notice of their acts (App., *infra*, a-86) and how does this disqualify the science of description of the hazard imposed by defendants' clearcutting the hillside above and within her W.O.N.?

The directed verdict denied damages to petitioner for all of defendants' acts against her private property W.O.N.

III. The Decisions of the Oregon Courts are Erroneous

A. The trial court Judgment on Injunctive Requests (App., *infra*, a-1,a-2) which states that petitioner's W.O.N. must be kept open for public use is erroneous, because the W.O.N. is still petititioner's private property. Petitioner's reasoning is that:

I-A: Private property includes private property of money, private property of labor, and private property of 'bundle' of private property rights as well.(73 C.J.S., property, 1987,p.178,p.181)

I-B: Private property of money and labor and private property of rights associated with them of petitioner and her predecessor in interest was used to establish, construct, and maintain the W.O.N. (App., infra, a-45 through a-55)

I-C: Eminent domain constraints require that private property can only be taken for public use. (*29A C.J.S., eminent domain, 1987, pg.141*)

I-D: U.S. 5th amendment requires that just compensation be paid for taking private property for public use.

I-E: Just compensation has not been paid to petitioner or petitioner's predecessor in interest for the taking of their private property for public use.

I-F: Therefore, petitioner's W.O.N. is still petitioner's private property. Private property taken under eminent domain remains private property, with all private property rights, until just compensation has been paid by the state for the taking of that private property for public use

I-G. Therefore, Oregon's statutory W.O.N. legislation is unconstitutional and Oregon's judicial acts of the trial court judgment on injunctive requests, the Oregon Court of Appeals decision of 'affirmed without opinion', the Oregon Supreme Court decision of 'review denied' violate petitioner's constitutional rights under U.S. Constitution, 5th Amendment and 14th Amendment and are therefore erroneous.

B. The trial court Judgment on Damages Claims (App., infra, a-3,a-4), directed verdict,which denies damages for defendants' acts is erroneous because her constitutional 7th amendment right to a trial by jury was denied. Petitioner's reasoning is that:

> I-A: The 7th amendment has no conditional clauses. The phrase 'the right of trial by jury shall be preserved' has no qualifying or exception phrases. This clause does not say 'the right of trial by jury shall be preserved except by directed verdict'. Nor does this clause state any limitations on evidence. It just plain says that the right of trial by jury shall be preserved. This right is not preserved by directed verdict rulings.
>
> II-B: Petioner's evidence for landslide risk damage connected defendants' logging acts to that risk by scientific testimony of her expert witness.
>
> II-C: Petitioner's contractor's cost bid breakdown for road repair was valid and relevant evidence. Denial of admission of valid and relevant evidence was erroneous.

IV. The Questions Presented are Important

The questions presented are important because only **this** court can remove the contradictions, confusion, ambiguity, and contrived complexity creating injustice and restore consistency, clarity, and justice after a 200 yr. history of denial of W.O.N. 'owners' 5th and 14th amendment rights.

The questions presented are important because they involve three constitutional amendments, namely, the U.S. 5th, 7th, and 14th amendments related to petitioner and all citizens, and the restoration of their meaning to their original statements, without qualification, as a birthright of all citizens.

The questions presented are important because they ask that state law must conform to constitutional test of original whole phrases in U.S. constitutional amendments and not just one term of those phrases.

The questions presented are important because W.O.N. owners, like petitioner, should not be treated differently than other landowners, that the equal protection clause of the 14th amendment must apply to them as well.

The questions presented are important because there are many other statutory W.O.N. owners in Oregon and elsewhere who are equally negatively affected by the statutory W.O.N. legislation which is similar in construct and therefore similar in violation of their 5th and 14th amendment rights as well as petitioner's rights.

The questions presented are important because petitioner for writ has been so severely damaged . The Oregon courts' decisions affirming unconstitutional legislation as constitutional results in a serious injustice by denying just compensation for petitioner's and petitioner's predecessor in interest for their private property of the W.O.N. taken for public use, in this case, worth about $100,000 as is, with defendants' damage uncompensated. (This graveled roadway is about 1/3 mile long and descends 320 ft. in this distance). This injustice results in serious consequential injustice to petitioner burdening her with yet additional costly litigation and time theft to reclaim her constitutional rights and recover her damages from those constitutional rights being denied by the state of Oregon.

Lastly, the questions presented are important because this is the court of last resort for petitioner to have her constitutional rights restored and be compensated for all damages, both those from the acts of the State of Oregon, and those from the acts of defendants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Petitioner, Nanette M. Dettlaff, states under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on Nov.2, 2001, in compliance with 28 U.S.C. § 1746 (2), signed below.

Respectfully submitted,

Nanette M. Dettlaff

Nanette M. Dettlaff, pro se

18675 Highway 9
Boulder Creek, CA 95006
(831) 338-7637

November 5, 2001

Appendix A

Oregon Trial Court Judgment on Injunctive Request
8 1/2 x 11 Original necessitated this retyped verbatim copy to conform with U.S. S.Ct. Rules 33-(b), 33-(c).

FILED at 4:34 O'CLOCK PM
SEP 03 1999

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DOUGLAS

NANETTE M. DETTLAFF,	)	
Plaintiff,	)	No. 98CV2955C
	)	
v.	)	JUDGMENT ON
	)	INJUNCTIVE
	)	REQUESTS
PAUL HADDOCK, SHERYL	)	
HADDOCK, husband and	)	
wife, and SUSAN	)	
CALLAHAN, and individual	)	
	)	
Defendants.	)	
	)	

THIS MATTER came before the undersigned Judge for trial on the parties cross-requests for injunctive relief and for a declaration establishing the rights and responsibilities of the parties in the use and maintenance of the way of necessity. The court has considered the evidence introduced at trial on August 24, 1999, the arguments of counsel, and the memorandum filed on behalf of the parties. The court is fully advised.

Now, therefore,

IT IS HEREBY ORDERED as follows:

1. The statutory way of necessity established by order of the Board of County Commissioners of Douglas County, Oregon, on July 18, 1973, is a public easement and must be kept open to the public.
2. Plaintiff is required to maintain the way of necessity to a level sufficient to allow passage of the type of vehicles for

which the roadway within the way of necessity was originally designed.

3. If Defendants or others use the way of necessity in a manner that causes damage thereto, they must repair the roadway to a condition equal to or greater than existed prior to such use.
4. Plaintiff, Defendants, and others using the way of necessity may not unreasonably interfere with the use of others who may be upon the roadway and the parties are required to cooperate during the periods of joint use.
5. Plaintiff is enjoined to remove the gate currently blocking access across the way of necessity.
6. Plaintiff is enjoined from diverting the water overflow from Defendants' spring from its current path which takes it through the culvert located directly below Defendants spring.
7. The Defendants have voluntarily withdrawn their request for an injunction enjoining the Plaintiff to reconstruct the road entirely within the 30 foot way of necessity as originally established by the Board of County Commissioners of Douglas County.
8. Justice and equity require that no cost be awarded to either party.

DATED this 3rd of Sept., 1999.

(signature)
Judge Thomas W. Kolberg

Submitted By:
BROWN, ROSETA, LONG, McCONVILLE,
KILCULLEN & CARLSON
John F. Kilcullen, OSB#83259
Attorney for Defendants

Correct Transcript verified 6 day of Oct., 1999 by the Trial Court Administrator (signature illegible)

Appendix B

Oregon Trial Court Judgment on Damages claims
8 1/2 x 11 Original necessitated this retyped verbatim copy to conform with U.S. S.Ct. Rules 33-(b), 33-(c).

FILED at 4:34 O'CLOCK PM SEP 03 1999

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DOUGLAS

NANETTE M. DETTLAFF, Plaintiff,	No. 98CV2955C
v.	JUDGMENT ON DAMAGES CLAIMS
PAUL HADDOCK, SHERYL HADDOCK, husband and wife, and SUSAN CALLAHAN, and individual, Defendants.	

THIS MATTER came regularly before the undersigned Judge and a twelve person jury for trial on August 24, 1999. The Plaintiff appeared personally and through her attorney Daniel Q. Gallagher. The Defendants appeared personally through their attorney John F. Kilcullen. Plaintiff presented her evidence and at the close of Plaintiff's case in chief, Defendants moved the court for a directed verdict on the Second Claim for Relief of Plaintiff's Second Amended Complaint. The court considered the motion and the arguments of counsel, and determined that the motion should be allowed. Thereafter, Plaintiff voluntarily dismissed her third claim for relief and Defendants voluntarily dismissed their first counterclaim. Now, therefore, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's Third Claim for Relief and Defendants First Counterclaim be and are dismissed.

IT IS FURTHER ORDERED that Defendants Motion for Summary Judgment as to Plaintiff's Second Claim for Relief should be and hereby is granted and JUDGMENT is entered in favor of Defendants and against Plaintiff together with Defendants cost and disbursements to be determined pursuant to ORCP68.

DATED this 3rd day of Sept., 1999.

(signature)
Judge Thomas W. Kolberg

Submitted by:
BROWN, ROSETA, LONG, McCONVILLE,
KILCULLEN & CARLSON
John F. Kilcullen, OSB#83259
Attorney for Defendants.

Correct Transcript verified 6 Oct., 1999 by the Trial Court Administrator (signature illegible)

Appendix C

Oregon Trial Court Supplemental Judgment
8 1/2 x 11 Original necessitated this retyped verbatim copy to conform with U.S. S.Ct. Rules 33-(b), 33-(c).

FILED at 3:29 O'CLOCK PM SEP 29 1999

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DOUGLAS

NANETTE M. DETTLAFF, Plaintiff, v. PAUL HADDOCK, SHERYL HADDOCK, husband and wife, and SUSAN CALLAHAN, an individual, Defendants.	)	No. 98CV2955CC SUPPLEMENTAL JUDGMENT

Based on the Judgment entered on this _____ day of _____, 1999,

MONEY JUDGMENT SUMMARY

Judgment Creditor	:Nanette M. Dettlaff
Judgment Creditor's Attorney	:Daniel Q. Gallagher
Judgment Debtors	:Paul Haddock, Sheryl Haddock, and Susan Callahan.
Judgment Debtors Attorney	:John F. Kilcullen
Amount of Judgment	:$-0-
Pre-Judgment Interest	:None
Post-Judgment Interest Rate	:9% (simple)
Costs and Disbursements	:$1,205.00

DATED this 29th day of September, 1999.

(signature)
Judge Thomas W. Kolberg

Appendix D

Oregon Trial Court opinion (transcript verbatim excerpt, pp. 132 through 174, inclusive).
8 1/2 x 11 Original necessitated this retyped verbatim copy to conform with U.S. S.Ct. Rules 33-(b), 33-(c).

Mr. Gallagher, Attorney for Plaintiff (Ms. Dettlaff);
Mr. Killcullen, Attorney for Defendants (Haddocks, Callahan).

(Whereupon, the jury exited the courtroom and the proceedings continued as follows)

MR. KILLCULLEN: This is a motion for directed verdict on plaintiff's second claim for relief seeking damages to the road or any damage to the road. There's been a complete lack of evidence proving any relationship between the defendant's activities and any observations that might have been made about the road. Anything that's been offered by the plaintiff is pure speculation, as she pointed out, and neither of the witnesses were able to tie anything to anything.

THE COURT: Well, let me – you're talking about plaintiff's second claim for relief?

MR. KILLCULLEN: Yes, your Honor.

THE COURT: Of the second amended complaint?

MR. KILLCULLEN: Of the second amended complaint. That's the one where they're seeking 60,000 dollars to repair the roadway to its condition before. There is no evidence as to what the condition was before, what it would take to get it back to the condition that it was before. In fact, the discussion that we had in chambers before the trial when the Court explained to the plaintiff's counsel what was going to be necessary, I guess I didn't hear any of the evidence that was going to be needed to sustain this claim.

MR. GALLAGHER: Your Honor, Lee White testified as to the condition of the road at the sale of the property. Miss Dettlaff testified as to maintaining that road up to and beyond the date of the logging operation. Doctor Spigolon testified as to what a large vehicle with a full load would do to the road and showed photographs and explanation of what he observed when he was out there showing some damage to the roadway. I believe that this issue should go to the jury. There is sufficient evidence for it to go to the jury.

THE COURT: Well, there may be evidence that some damage to the roadway occurred as a result of heavily weighted vehicles going over the road but I'm not sure that there's any evidence of any – of any succinctness or clarity about what exactly was done to the road and what exactly it would cost to put it back in the condition it was in before that logging occurred. Costs. I mean you didn't say for example that – I mean, are we talking about just rebuilding the whole road for your client, is that what you want? I think the measure of damages is cost of repair, right?

MR. GALLAGHER: Yes.

THE COURT: Okay. So don't we have to know what repairs are necessary to the road? For example, this Exhibit 10 that I sustained the objection to talks about replacing culverts, for example. I don't know how rusted out culverts have anything to do with the logging operation.

MR. GALLAGHER: I don't know why that's included in his estimate either, your Honor.

THE COURT: I don't know what pulling all the ditches at so much a lineal foot has to do with the logging operation.

MR. GALLAGHER: Just the slash that's been testified to.

THE COURT: But it was never narrowed down enough for the jury to come up with any meaningful figure that they could tie a verdict to.

MR. GALLAGHER: We've had testimony as to what a –

THE COURT: I mean, it wasn't like there's a hundred feet of ditch that has to be pulled at a particular location and that will cost one dollar a foot, two dollars a foot, less than that. That's what I'm getting at. Just to say to clean out all the ditches without any evidence that the logging operation was a cause of these ditches over the years getting in less than optimum shape isn't adequate because if the road was as old as it was and it had been used as much as it had prior to this particular logging operation, it would seem to me that the rusting of the culverts and some of the problems with the ditches and so forth certainly wouldn't have been caused by the logging trucks going over the roadway.

MR. GALLAGHER: No. I'm more specifically speaking of the regrading of the road and laying of gravel to address the rutting caused by the large vehicular traffic. We got testimony as to the tractor used by Mr. Haddock. Miss Dettlaff, the only vehicle she uses other than when she moved in is –

THE COURT: What figure could the jury decide it would cost to repair the road? If you were on the jury considering the evidence that's been presented here this afternoon and you had to go in and discuss this issue with the jurors about what substantial evidence is there that would support the verdict?

MR. GALLAGHER: Well, the only thing –

THE COURT: Just tell me what it would be. What would you argue for?

MR. GALLAGHER: The only thing that we have that provided that was left out of evidence, the estimate by Umpqua Valley or Umpqua whatever they are.

THE COURT: Well, that's simply because there wasn't a sufficient foundation to show that he had any knowledge of what the condition of the road was prior to the logging operation and what it would cost to bring it up to that condition because we're not talking about rebuilding a road for your client. We're talking about simply bringing it up to a condition comparable to what was there prior to any log truck going over it, right?

MR. GALLAGHER: Yes.

THE COURT: All right.

MR. GALLAGHER: But none of the experts could be there to see what it was like before the logging operation. All we have is the testimony of Lee White and Miss Dettlaff as to the condition of the roadway beforehand.

THE COURT: Well, you know, Mr. White wasn't very helpful simply because I think he said he hadn't lived there for thirteen years.

MR. GALLAGHER: Right.

THE COURT: And the road was approximately thirteen or twelve or thirteen years old when he moved so –

MR. GALLAGHER: Yes. He did testify that he'd been out there recently, though, and that the roadway was being maintained adequately.

THE COURT: But your expert said there were portions of the road that were just fine.

MR. GALLAGHER: Yes, he did.

THE COURT: So why do we have to resurface the entire road with four inches of gravel and clean out all these ditches and replace culverts as a result of these log trucks going over it? That's what I'm getting at. What would it take to just simply deal with those areas that your expert said there was some rutting taking place? What would it have taken to do that then? I understand he said he wasn't qualified because he wasn't a cost estimator, but did anybody go out with him and measure those areas and say, well, okay, if we had to put four inches of rock over an area a hundred yards long or, twenty feet long, how much would that cost versus resurfacing the entire road?

MR. GALLAGHER: No, no one went out with him to do that.

THE COURT: Well, I don't think there's sufficient evidence from which the jury could come up with a figurer on damages even if they concluded that there had been some damage done to the road. I'm talking about monetary damages.

MR. GALLAGHER: I know what you're talking about.

THE COURT: They would have to have something to sink their teeth into and there just isn't sufficient evidence at this point for them to come up with a figure. If I were to tell them tell us what it would cost to repair the road, I'd have twelve people looking at me with big question marks on their faces based on the evidence that's been presented. The motion for directed verdict is allowed.

What do we have with respect to the other two claims for relief? The first claim for relief is what? That's dealing with the declaratory judgment so that really doesn't have anything to do with the jury. And what is the third claim for relief? Oh, that deals with diverting the spring.

MR. KILLCULLEN: Your Honor, it would help the plaintiff – my clients are willing to dismiss their counterclaim if she'll dismiss her other claim and then we'll let the Court decide the declaratory judgment action, and I don't have anything else I would add on the DEJ, quite frankly.

THE COURT: Well, we have a claim for damages for blockage of access to her property.

MR. KILLCULLEN: I understand that. I'm just saying they're both nominal claims and rather than spend another day in trial, we're going to spend more just coming here and getting our other witnesses than either of us would stand to gain, and we would be willing to dismiss our counterclaim if she'll dismiss the third claim for relief and let the Court decide the declaratory judgment or the injunctive relief.

THE COURT: There's also a claim for attorney fees. What's that based on?

MR. GALLAGHER: There's a statute. ORS 28.100.

MR. KILLCULLEN: It's my recollection that action only allows recovery of costs incurred and it doesn't specifically refer to attorney fees. I'm not aware of any cases where attorney fees have been awarded in a DEJ action to the extent this even really should be DEJ action, it probably should be an injunctive claim anyway. And just in case the Court was wondering about why I didn't file any motions regarding specificity along the way, I run into a problem given who was paying my fees of doing anything that has a potential of taking my client out of coverage.

THE COURT: Well, at some point in time – it's not necessary for me to make this decision now. Whether or not 28.100 under costs includes attorney fees or not is something you all can argue later. That doesn't have anything to do with the jury.

MR. KILCULLEN: No.

THE COURT: So those are the only claims that are left?

MR. GALLAGHER: The blockage and the diversion of the spring.

THE COURT: Well, I guess you and your client will have to decide whether or not you want to accept the defendant's offer that they would dismiss all their claims against your client if she would dismiss the remaining claims against them. I can't involve myself in that, so I'll retire to chambers for about five minutes and you can let me know when you come back.

MR. GALLAGHER: All right. Thank you.

(Thereupon, a recess was taken, and then the proceedings continued as follows:)

MR. GALLAGHER: Your Honor, Miss Dettlaff is willing to accept the offer of the defense as to the remaining claims for damages.

THE COURT: Okay. Let's be very clear on what you're saying so that the record is clear.

MR. GALLAGHER: We are requesting that our remaining claims for damages, other than the claim that has already been ruled on by the Court by a directed verdict, be dismissed.

THE COURT: Okay.

MR. KILCULLEN: And in exchange the defendants will dismiss their counterclaim which seeks damages.

THE COURT: Okay. As far as the declaratory judgment, you know, what can I tell you other than what the Oregon Supreme Court has said about ways of necessity. I mean I have no – nothing to do but quote to you what the Oregon Supreme Court has said and that is in order for these ways of necessity to be constitutionally created they have to be remain open to the public's use because there – a private person does not have the right to condemn a right of way across somebody else's property. Only the government has the right of eminent domain and if the government goes in and forces somebody to give up their property so you can use it for a roadway, then in order for that to be constitutionally permissible for the government to do that it can only be done if it's created for a public purpose. Do you follow that reasoning at all? Otherwise you wouldn't have a way of necessity and this idea that it's my road and it's private and I'll lock it up and nobody can ever come down there unless I consent to them coming down there, then you've created a private easement not a way of necessity. And easements are only created by implication of law or by private contract through conveyances, do you understand? This is a roadway that was created by a governmental body dictating to the former owners of the defendant's property that you must give up your property to Mr. White so that he has access to his property. He was ordered to basically give Mr. White land to create a road across the defendant's predecessor's land. Do you understand that? And when a governmental entity comes in and tells somebody they have to do that, they don't have the power to do that unless they're doing it for somebody other than just a single private person. They have to do it only for the public at large. So it was created for ingress and egress to the land you live on but you can't lock up the road and not let anybody else use it. And I can quote from the Oregon Supreme Court on that. I have the cases right here that say that has all the attributes of a public road, but you have the responsibility of maintaining it because there wouldn't be any need for the road in the first place if you didn't insist on having it.

MISS DETTLAFF: May I ask a question, your Honor?

THE COURT: Yes.

MISS DETTLAFF: I simply don't understand how, even the language you just used, you said gave Mr. White the land when. In point of fact, he didn't give Mr. White the land if it's a public road. And this is where the conflict comes in, in that all the costs were borne by an individual for an action the defendant didn't give access to. Oregon benefitted. It could have audited the land and paid for the road itself. But when a private party is burdened with that, then the roadway itself becomes a commodity and expenditure, and isn't that a taking?

THE COURT: Well, no, because if the county had come in and taken the land from the defendant's predecessors in interest for purposes of a public road, the county would have had to pay the predecessor in interest. He still gets paid for the land, you see.

MISS DETTLAFF: But the county is a public entity, you see, and therefore it makes sense to say, okay, it's a public road, the public uses it, public funds created this road and the public is the determination, but to me the roadway served a public purpose in that in providing ingress and egress. It didn't condemn land that the state then had access to for the benefit for taxes for use, see. So I don't – I was just asking you to explain to me how my constitutional rights are not violated in the taking of me and my predecessor without compensation by conversion of a road, a commodity, an expenditure of this roadway solely paid for by my predecessor and myself.

THE COURT: No, no, you're already off on a tangent that doesn't have anything to do with our discussion. What I said was you are entitled to be compensated for any damage done to that road by the defendants that resulted from their logging operation. I've already ruled on that. I told your lawyer and the other lawyer in chambers this morning that if you could put on evidence to show that your road was damaged as a result of their logging operation that they would be required to pay the cost, the reasonable cost to repair it. That's not a question, that anybody can come in and tear up your road and you still have to fix it. That's not the question. If somebody comes in and tears up the road and is using it for some use other than for what it was originally created, they are required to pay you damages for the repairs. There's no question about that. That issue of the case is out simply because of a failure of your evidence to establish specifically what the damage was and what the specific cost of repairing that is, that's all. There just isn't enough for the jury – enough evidence for the jury to make a determination with any reliability. That's not the issue we're talking about here. We're talking about locking up the road so nobody can use it other than yourself.

And let me read from an opinion of the Oregon Court of Appeals and it's a 1984 case. It's not a real old case, okay. And maybe that will make some sense to everyone. And I hope I don't bore you but I'll read this as quickly as I can and I'm taking this from page 448 of the opinion and it's Chapman versus Perron , P-E-R-R-O-N, and cited as 69 Oregon Appeals 445, it's a 1984 case, and it talks a little bit about this issue about constitutionality that I was talking about and why I have drawn the conclusions that I've drawn. The second full paragraph, beginning there it says, "Though conceding that 'way of necessary' as defined is silent as to private or public use, the defendants argue that the distinctive definitions imply that the public may be excluded from a statutory way of necessity.

To reinforce this position they point to ORS 376.190 (1) which provides, " and then they quote the statute, quote, "A way of necessity that is established under ORS 376.150 to 376.200 shall be maintained and kept passable by the person owning the land for which the way of necessity is established." That's you. "This subsection does not require the person to provide for maintenance of the way of necessity for uses or persons not specifically provided in the order establishing the way of necessity."

Now, that's the way the statute is currently written and I don't know whether that was changed at some point but since that's to your benefit, let's apply that reasoning. In other words, you're not required to maintain the way of necessity for uses or for other persons that weren't intended to be using it initially, okay? And that's where I drew the conclusion in part that if somebody comes in and damages the road, they have to – they have to fix it, not you, all right? And then I'm going to quote from the opinion again. "Because a private party need not maintain the way for uses or persons not specifically provided in the order establishing the way, the defendants claim that the way created is not consistent with a public right to use it." That it's inconsistent, they say. And the Court says, "Although the current statutory scheme does not expressly state that a way of necessity is public, we are bound to adopt a construction of the statute that will uphold its constitutionality if such construction is reasonable. Nothing in the statutory scheme requires a construction that the public may be excluded." What they're saying is there's nothing in the statute that gives the county the right to create these ways of necessity that states that the public can be excluded from these ways of necessity. "The law was clear when the statute was adopted that to be valid," in order for the statute to be valid, "The way must be open to the public. We will not assume that the legislature enacted an unconstitutional law." What they're saying is that if the county thinks they can come along and require one person to give up land just for another private person's use, that would be unconstitutional. They have to, if they're going – if you're going to invoke the government's power to take property away from somebody, you can only do it for the public's use.

MISS DETTLAFF: Yes.

THE COURT: And that's maybe a fiction but that's the only way they can get around and uphold the way of necessity statute as being a constitutional statute. Otherwise it would be unconstitutional, there wouldn't be any ways of necessity. You either, when you buy your property, you either bargain for an easement or you don't buy the property or you're landlocked or you can't use it for your residence. I guess you could fly in with a helicopter or something. Do you know what I'm getting at?

MISS DETTLAFF: Yes. I think for myself the distinction between public purpose and public use, and public meaning that other persons other than myself, in other words the way of necessity on the property, it wasn't just Lee White's friends or my friends, it could be the general public that could come in. At my consent I know that this person is coming in –

THE COURT: No, it doesn't have anything to do with your consent.

MISS DETTLAFF: That was the misunderstanding. I found it very hard to believe that I was responsible for a 100,000 dollar commodity called a roadway and anyone could use it without my consent.

THE COURT: Well, that's something that you bite off when you get a way of necessity. That's one of the responsibilities you assume when you ask for a way of necessity. See that's the problem.

MISS DETTLAFF: And the other misunderstanding on my part was that when he petitioned, he petitioned for ingress and egress, and so the other understanding was that if the road was constructed for the purpose of ingress and egress to the property that any other uses were not part of the petition. It seems like the contract was changed so there was a confusion on my part.

THE COURT: It's not a contract, though.

MISS DETTLAFF: Well, it is. Whoever owns the property has a contract to maintain it. It's an obligation. It's a financial obligation. That's what you're saying to me, I have one hundred percent responsibility but only a fraction of the rights.

THE COURT: Well, then you have a quarrel with whether Mr. White should have even gotten the way of necessity. At this point you're saying Mr. White should not have been granted the way of necessity because he wasn't willing, nor were you as his successor in interest, ever willing to allow any public use.

MISS DETTLAFF: I was thinking about public use that was responsible, and I felt that I had the right to restrict that use to people who are not responsible on the roadway, people who obstructed me, people who damaged the road just as anyone in your house. That was my misunderstanding. I thought this 100,000 dollar road was a commodity, an expenditure, a capital expenditure. It is way beyond what I personally am able to be able to handle.

THE COURT: Well, I know, but you see, unfortunately, we live in a society where contract law is very important, property rights are very important, but along with those rights go responsibilities, and the normal reaction –

MISS DETTLAFF: But they have no responsibility.

THE COURT: I know but the normal reaction of the person on the street would say why buy a piece of property with all these problems if they're not capable of handling it.

MISS DETTLAFF: And my answer to that is no one would have bought it if that had been inclusive in the statement but when you read the petition – when you see the recording that's not what I got out of reading the recording nor what I got out of reading the constitution about – fundamentally, I'm placed in servitude to the state. I'm providing a public road personally.

THE COURT: That is because it's a way of necessity. It's not a private easement.

MISS DETTLAFF: The definition doesn't change the rights versus responsibilities. That, to me, is a taking to me.

THE COURT: Oh, yes, if it was a private right of way, you could put a gate on it and lock everybody out and you would be the only person using it but it isn't a private right of way, you see. In order for Mr. White to have gotten the benefit of that roadway, the benefit being his right to put that road in there across his neighbor's property, he had to acknowledge that the public had the right to use it. Now, there may not be a need for public use. I mean ten years could go by with nobody driving down there that has no business down there but somebody might just decide someday to drive down there to see what's down there, and if it's all locked up then, theoretically, it isn't open to the public.

MISS DETTLAFF: Now what you're saying is I must remove the gate, remove the lock, then a million hunters can come down this fall because that's what you've decided.

THE COURT: No.

MISS DETTLAFF: No? I can't lock the gate you told me. It's a public open right of way.

THE COURT: I don't know what that has to do with people hunting on the property though.

MISS DETTLAFF: Because hunters come down that road. It was one of the reasons for installing a gate in the first place because people with guns who had no business on my neighbor's property who could have set off forest fires – in other words, I was trying to be responsible in putting the gate up. So that's why I want the clarification. You're telling me the gate must go and the lock must go; is that correct, your Honor?

THE COURT: I'm saying the gate must go and the lock must go if it's going – if it's going to be maintained as a way of necessity and not a private easement. Now, if you all want to agree to enter into an agreement with your neighbors to convert it into an easement and not a way of necessity and work out an agreement on maintenance on the road, etcetera, etcetera, that's fine. But you can't – you cannot lock people off of a road if it's a way of necessary because the only way Mr. White could get the way of necessity under the statutory scheme that they referred to is to agree that the public wouldn't be locked out.

MISS DETTLAFF: See, what happened actually in history is that bench road that White talked about would have been an implied way of necessity because Baker owned both of those properties between 1901 and 1904.

THE COURT: You're talking about an implied easement.

MISS DETTLAFF: Well, no, an implied way of necessity because no man would have landlocked himself. And when the property was divided and sold out –

THE COURT: That's an implied easement.

MISS DETTLAFF: Well, no, it's an implied way of necessary because no man would land lock himself.

THE COURT: I think you're misusing the terms. The way of necessity under the statute, the reason it's referred to as a way of necessity is because it talks about property being locked in and having no access to the public road and there has to be a way created for that person to get to the public road and they call it, the need to create that, is a necessity but when people sell property as grantors, private individuals, and they either land lock themselves in or they land lock their grantees in and they don't expressly make a reference in the deed about how that person is going to get out of there, then the law will imply an easement. But the easement is based on necessity too but it's not called a way of necessity.

MISS DETTLAFF: Right. But the implied easement existed when Harrison locked Lee out, that's my point, and so then Lee had to go through this huge expense once to create the separate road which I guess has just been a public benefit. It's been pretty nice to kind of create this road so now the public has the benefit, the neighbors have an extra access road and logging road and then now whoever wants to come up and down that road can actually trap me in my house if they choose. I mean it's really not possible to-control it in a situation, so I'm just trying to understand what my position is, whether I choose to live there or not under the conditions you described. I understand what you're describing and the statute.

THE COURT: I'm not describing the conditions. I'm describing what the Courts have said about what the statute required.

MISS DETTLAFF: That's right, what the law said.

THE COURT: Yeah, I don't have an interest whether you lock anybody or don't lock anybody out personally. I understand your predicament, but that isn't the law. The law doesn't say to me you do whatever you feel like doing. I have to follow the statutes and the decisions of our Appellate Judges and our Appellate Judges say that in order for these ways of necessity to be created constitutionally, there has to be allowed a public use. And you can't just create one and then lock everybody out and just say it's mine. Otherwise, the statute could not – there wouldn't be any constitutional way, as I understand the law, and the lawyers are sitting here too, they have a right to chime in if they want but as I understand the law you couldn't have a way of necessity created in this manner as we have here in Oregon with this statutory scheme and have it be constitutional if it was just for one private person's use because a private person does not have a right to demand that the government intercede on their behalf and condemn somebody else's property for a roadway just for their own private purposes, do you understand?

MISS DETTLAFF: Yes. And I also understand that the individuals in that position also couldn't demand that the state treat them in the same way as every other person who had access to a public road by placing the burden of the expense for that kind of activity on the state itself.

THE COURT: Yes, they can, because they're simply saying to you if you want the benefit of this road, you have to assume the responsibility for maintaining it. That's all they're saying. You don't have to get a way of necessity. It's a quid pro quo thing. They're saying in order for us to intercede on your behalf and make your neighbor sell you some land for a roadway you have to assume the responsibility of taking care of that road even if it's going to be used by persons other than yourself. That's one of the responsibilities, as I mentioned earlier, that you bite off when you go in to the county commissioners and ask them to send the Road Master out and design a road across your neighbor's property for your benefit is that, one, you're going to pay for it; two, you're going to main it and, three, you're going to leave it open so others can use it. Those are kind of the salient obligations you take on when you ask the county to intercede in your behalf and create a way of necessity but you do not agree to allow people to use it for any and all purposes. You agree to allow them to use it for the kinds of purposes that roadways of that nature are created for and are used for and if they come in and they do it wrongfully, as the defendants did here, they were wrong in doing what they did, they have to pay for any damage that they do.

MISS DETTLAFF: They're not paying.

THE COURT: Because you haven't proved the damages they did and what it would cost to repair it. That's the only question. It's not whether the jury would have been allowed to award you damages had they found that there had been damages and there was a specific sum that they could award as compensation. We already crossed that issue. I've already said – in fact, they conceded in their briefs that they filed, as I recall when I read the trial memorandum, they conceded that if you could establish with any – by a preponderance of the evidence that they caused damage to the road and what it would cost to repair it that they would have to pay it.

MISS DETTLAFF: Didn't Mr. Spigolon report the damage for the logging that has created a landslide peril?

THE COURT: I don't know if he did or not.

MISS DETTLAFF: Because you haven't read it, yet you dismissed the –

THE COURT: I just dismissed it because there wasn't any evidence of the actual cost. Going back and –

MISS DETTLAFF: But his report contains the cost and his testimony contained the cost.

THE COURT: I didn't understand that his report had the cost of repairing the road.

MR. GALLAGHER: It had recommendations for addressing the –

THE COURT: What was the cost figure?

MR. GALLAGHER: Twenty to fifty, depending on which method you used. There were three methods listed.

MISS DETTLAFF: And see the problem there is that if you say, okay, here is the method you choose to do it, then you can say, okay, here is the cost, and then the other guy can say okay here is the cost –

THE COURT: Well, okay, I wasn't aware that his written report contained an actual – I guess perhaps I should look at that in case I have to backtrack on my ruling on the motion for directed verdict. Let me see it. I didn't realize he said there was a specific sum of money that would be needed to repair –

MR. KILCULLEN: The problem is he can't relate it to the logging.

THE COURT: Where are we? Help me out here because it's so late in the day –

MR. KILCULLEN: I'm looking at page 4 of 5. It says landslide potential and the second paragraph says the possibility for a landslide exists, although the probability cannot be assessed, and that was consistent with his testimony. And then his – the problem was that he didn't provide any testimony that related with any reasonable probability the landslide potential to the activities of the defendant, and any damage figures that he put in there are those dealing with a potential for a – a speculative potential for a landslide.

THE COURT: All right. Well, first of all, there has to be some probability here. You can't, as I explained to your lawyer this morning in chambers, the isn't a situation where the jury can go out and say we'll give you 25,000 dollars, and then you sit on that money for the next ten years to see whether there's ever a landslide and you might need it or are not. That's the situation here. We have to have somebody say with reasonable probability that this is creating a problem that has to be corrected now.

MISS DETTLAFF: That's what he says in the report, your Honor.

THE COURT: He says the possibility for a landslide exists although the probability cannot be assessed and you have to establish it by probability not just speculation.

MISS DETTLAFF: Your Honor, if something is moving all the time in a little amount, and then you suddenly pass over the threshold and the whole hillside comes down, you can't say – how are you going to establish the probability? You just know that there's a problem there, that a problem should be addressed, so then on the one hand are you going to say that because I didn't maintain the road because I didn't pay for a 50,000 dollar retaining wall that I'm at fault for not maintaining the road, that I violated the statute?

THE COURT: What kind of guidance does it give to a jury? And I should be talking to your lawyer rather than you. I don't know how we got into this personal conversation.

MISS DETTLAFF: I'm sorry.

THE COURT: But what kind of guidance does it give to the jury to say that there's a possibility that this might occur and it can cost anywhere from twenty to 50,000 dollars? What kind of guidance does that give to a jury? First of all they're supposed to say, well, it's possible it could have happened and, two, so we probably should go out and correct it since it is a possibility and we don't know but maybe we could be 50, maybe it could be 45, maybe it could be 30, maybe it could be 35, maybe 20. See, it's too uncertain.

MR. GALLAGHER: Because I was party to your conversation this morning, I may not have adequately explained your position to my client, and that may be a source of confusion here.

THE COURT: Well, you have to establish damages with some – it doesn't have to be with any high degree of certainty but it has to be reasonably certain so that people just aren't subjected to the whim or capriciousness of a jury. They have to have some strong evidence that they can point to that supports their verdict. The other thing that I'm concerned about is all this reference to some rutting in the roadway in April during the rainy season. What would it cost? People are going to say, you know, there's 100 feet there on the curve that is getting rutted up and it needs to have three or four inches of rock on it. How much does it cost for a cubic yard of gravel? How much does it cost for the truck to bring it in? How much does it cost to hire a man with a grader to come in and to smooth it out and grade it? Is it 25 dollars an hour, is it 50 dollars an hour for the operator and the equipment? That's what I'm talking about, cost of repair, and not just, you know, not just throwing a figure out to the jury, well, this could be as much as 20 – or as little as 20 and up to 50 and all he was talking, as I recall, was about an area where there might be some instability that could result in some sliding or a landslide, but what does that have to do with all of these other things that were testified to?

MR. GALLAGHER: Your Honor --

THE COURT: I'm sorry that you – if you feel that I'm being unreasonable about that but I think that these cases just simply have to have more – they have to be presented with more definiteness and --

MR. GALLAGHER: Would it be reasonable for me to advise my client that she, in repairing this road is to repair it to the use that it was originally set, in other words, for small vehicle traffic rather than --

THE COURT: Well, see, my feeling about it and, of course, I – I'm only doing this because you asked me to try to explain why I did not let the jury decide that issue – my feeling about it is as soon as you knew about the logging operation, you should have quickly petitioned the Court for an injunction to prevent the logging.

MISS DETTLAFF: I had no time. I had one day.

THE COURT: You could have got what is called a temporary restraining order, which you can do in one day. I understand you're in a quandary, you don't know what to do.

MISS DETTLAFF: I didn't have an attorney.

THE COURT: Okay. Because I think that a Judge would have probably – would have enjoined or restrained the use of the road for logging equipment, at least without having a formal hearing as to what those uses were going to be and what potential there was for damage to the road and all of those kinds of things, but when it's already done and it's over with and the only question is damages, then you get into the position of having to put on evidence about what damages has been caused and what is the reasonable cost of repairing that damage. When did the logging occur?

MR. KILCULLEN: It would have been March and April of 1997, your Honor.

THE COURT: Okay.

MR. KILCULLEN: Did it go into May on that section?

MR. HADDOCK: It might have gone into May.

MR. KILCULLEN: Into early May.

THE COURT: Well, Mr. Gallagher, I guess you'll have to – you'll just have to deal with that as best you can but I don't recall the geotechnical engineer tying any of this road surface damage to the logging. He talked about going there in July of

1998 and the road was in good shape, which would have been after the logging, and then coming back after the rainy season in April of 1999 and finding some rutting. Well, if you had 120 inches of rain in that area and you're driving over it even with passenger cars you're probably going to have some rutting unless the road has been recently graveled or something. I don't –

MR. GALLAGHER: For my own purposes the expert changed his testimony from the last time I talked to him. I can't do anything about that.

THE COURT: So where do we go in the morning? As far as the declaration of rights –

MR. KILCULLEN: I can't think of any other evidence. I can't figure out how any of the requests being made are evidence dependent, your honor, and I have no need to come back or nor my clients, drag my clients back.

THE COURT: Well, as far as the declaratory judgment is concerned, what is it that you need beyond what I've already said, which is that the road cannot be turned into a private access? What is it that you want that you don't understand?

MISS DETTLAFF: What is it called, the road that I'm expected to maintain? Am I expected to maintain a logging road?

THE COURT: No. You're only expected to maintain a road that would be sufficient to supply the need that existed when the road was created.

MR. GALLAGHER: That was small vehicle traffic.

THE COURT: To meet the need. I said supply but you get the gist of what I'm talking about?

MR. GALLAGHER: That would be small vehicular traffic because Mr. White just needed access –

THE COURT: I don't know. I don't know what the evidence was about how many vehicles and what he used to get in and out of there.

MISS DETTLAFF: It wasn't built as a logging road, your Honor, but it's been used as a logging road, and I need to clarify that. Okay, number two, if the purposes or uses are beyond just ingress and egress, can you just give me a category list of all the uses that are proper and those that are improper?

THE COURT: No.

MISS DETTLAFF: All uses are proper?

THE COURT: No, I can't, other than referring back to the statute and the provision I already read to you that's quoted by the Appellate judges as the legislature put in there and whether that existed 1973 or '74 or not, I haven't gotten that far yet because I haven't asked the lawyers about that, but assuming that that language is there then, because in 1984 it was obviously there because they were quoting it, I think they quite specifically state what the uses are in the statute, and I couldn't tell you anymore because the evidence here, I guess, viewed in a light most favorable to you would be that the property that you're presently living on was used by Mr. White and his family as a residence and not as a farm.

MISS DETTLAFF: It's 23 acres, your Honor.

THE COURT: Well, we know he had a tractor on it because he used the tractor for purposes of grading the road and everything, and we know that he probably – there must have been – there was references to you taking a moving truck, a Ryder truck or something, a two ton truck in there or something. And I don't remember what the evidence all was but, you know, you're asking me to say exactly what size vehicle can use the road and everything, and I don't think I can based on this evidence. I can only say that the statute says that the uses will be similar to those that existed when the way was created, whatever those uses were.

MISS DETTLAFF: But you're saying that you don't give me injunctive relief but it's not to be used by heavy equipment or logging trucks, yet you're telling me I don't have to build it to a logging road, so see I'm still confused, your Honor.

THE COURT: That's because the legislature put you in that spot. I haven't put you in that spot.

MISS DETTLAFF: Thank you very much. That's exactly the position I feel, the legislature has placed me in this position of ambiguity of deep pocket and without clarity about knowing what I may or may not do. I mean like, for example, people can do it for more things than just traveling back and forth, in other words, moving traffic. They can park there; is that correct?

THE COURT: Not if it would block your ingress and egress.

MISS DETTLAFF: But they could park, picnic, so on, the public.

THE COURT: On the road itself, ma'am?

MISS DETTLAFF: The roadway is only ten feet. What I'm saying is what all can these people do? Can they sit there and party? Can they drink on the property --

THE COURT: No, they can't because we're talking about a roadway used for access. When we're talking about public use we're talking about for access only. It's not to go in there and build a fire like you said and camp on it.

MISS DETTLAFF: Okay, access to what? Access to all adjacent property as well as mine?

THE COURT: Yes.

MISS DETTLAFF: Okay, so then any general public person who is not using it for that access can be barred such as a hunter who has no business being there, or is the general public allowed to travel the road?

THE COURT: I would say if somebody came down there and just parked on the road, they could be barred, yes. They could be ordered to leave.

MISS DETTLAFF: Can you tell me how to go about that?

THE COURT: You're asking me for legal advice at this juncture.

MISS DETTLAFF: I'm sorry. See, they're not trespassing therefore so I can't call the sheriff –

THE COURT: But you haven't really had that problem.

MISS DETTLAFF: Yes, I have.

THE COURT: No, you've conjured up all of these nightmares because of your private disagreement with the defendants.

MISS DETTLAFF: No, we had the gate in the first place because we had hunters down there. I don't have large ranch animals, they do.

THE COURT: I assume if it's an area in which people can hunt at the consent of the landowner, if it is an area that people can hunt with the consent of the landowner, then a landowner that owns land in which this road goes through could allow people to hunt on their property. Now, how they get there, if they park on that landowner's property, whether it's Champion or somebody else, if they use this road to get there it's permissible, yes, it is.

MISS DETTLAFF: So you're saying a hunter could come down, park, and go out in the woods?

THE COURT: If he parks on Champion's property, yes. As long as he stays on Champion's property. He can't trespass on your property, obviously.

MISS DETTLAFF: No, no, we're talking about the way of necessity here.

THE COURT: People cannot just park cars on the road.

MISS DETTLAFF: But they can park off the road, change the drainage.

THE COURT: Ma'am, I think at this point you're just wanting to play games with me. I'm not –

MISS DETTLAFF: I'm not playing games.

THE COURT: I'm not here to try to handle the thousand myriad of problems that your imagination can conjure up. I can only give you general guidelines because that's all the law gives me to work with and to the extent that individuals would come down there that have no business down there that you would ask to leave, I am absolutely certain as I sit here that 99 out of 100 would leave without any problem at all, so what you're doing is you're conjuring up these things because you want to create some dispute here. I don't want to get into that dispute with you.

MISS DETTLAFF: No, sir, my house was broken into. That's why I ask the questions I do.

THE COURT: Why don't you put a gate at the entrance to your property then?

MISS DETTLAFF: Okay, that was the last question, how much time do I have to move the gate? Do I have to do it tonight?

THE COURT: No. No, you have a reasonable time.

MISS DETTLAFF: I guess I can leave it unlocked tonight if I go home tonight, which I will.

THE COURT: Well, if your neighbors don't care, you can keep it locked as far as I'm concerned but all I'm saying is that you would at some point, within a reasonable time, have to open that up.

MISS DETTLAFF: I'll have it moved by this weekend. I just wanted to know.

THE COURT: Well, that's not unreasonable.

MISS DETTLAFF: Okay.

THE COURT: And then put it down on your own property line. You can control the access to your property.

MISS DETTLAFF: Okay.

MR. KILCULLEN: Your Honor, there was one other thing that we asked for in the injunctive relief that I believe Mr. White covered and it has to do with the flow of the water that comes down from the spring. And he testified that it was originally planned to do down through the culvert and then on down. We want – one of the requests that we had was that the water continue –

THE COURT: You may have to put on more detailed evidence on that. I'm not sure I'm capable of directing how the flow of the spring water is supposed to be handled.

MR. KILCULLEN: There is a conflict in the evidence. I was looking for a short way to do that.

THE COURT: As far as I'm concerned, the water should go in the manner in which it was going at the time that the road was built. I mean how can I say it any different than that?

MR. KILCULLEN: And the only evidence we have of that was what Mr. White testified to which was that it went through the culvert.

THE COURT: Well, he said also at times in the rainy season that you had diffuse water and it kind of went everywhere. That doesn't help me either, does it?

MR. KILCULLEN: My clients can only testify about what it was like when they moved on there and how it was maintained so maybe there are a few issues we need to address in the morning.

THE COURT: You also have to do it in a manner that doesn't injure your neighbor's property. It doesn't make any difference whether you have the right under the law to even channel water off your property as long as you don't injure your neighbor's property, so it doesn't make any difference if you have certain rights. You can channel water, you can do whatever you have to to get it off of your own property, but you cannot do it in a manner that damages your neighbor's property. So if this helps anybody resolve this over the evening hours my reaction to that would be you can channel the overflow from the spring so long as it doesn't damage the road and so long as it doesn't get into Mr. Haddock's barn.

MISS DETTLAFF: Well, he built his barn after the drain was there.

THE COURT: It's still his property so you can't –

MISS DETTLAFF: Right. But it's his water.

THE COURT: -- you can't channel it. You can't bring this water into a particular channel that casts it in a particular locality on his property.

MISS DETTLAFFF: I know but it either goes down one way to damage this area he could claim or come down the other way to damage the other area. All I need is a court declaration about where they want the water to go.

THE COURT: Well, you all should be able to sit down like reasonable people and handle it better than I can. You're asking me to tell you when I've never even seen the land. I've never been out there and I don't know what the lay of the land looks like or the configuration of this conversation you had with the jury looking at this surveyor's drawing, so really, you and your lawyer should be talking to Mr. Kilcullen and his client as reasonable flexible adults and how can we correct this problem so it neither causes you heart ache or them heart ache is the best way to do it rather than saying, Judge, you tell me what I should do or shouldn't do. Does that make any sense to you?

MISS DETTLAFF: Well, it makes a great deal of sense if we can do that but it's been very difficult with the situation.

THE COURT: I probably wouldn't be able to do that without having a Judge view of your property and spending a lot of time walking the property myself so I can understand the evidence better, because, quite frankly, what has been presented here so far today is very confusing to me.

We can defer an express ruling from me on the request for an injunction until some later date to give you an opportunity to try to resolve this if you want to. Otherwise, I'd ask that you to come back in the morning and put on whatever you can put on, and then I still would have to defer my ruling. Like I said, I may ask for a judge view of the property. I may have to take an afternoon or more than that, I guess, if it's clear up by Loon Lake, but I'd probably have to drive in and take a look at it myself.

MR. GALLAGHER: I do have an offer from the defense and I will convey it to my client. I don't know whether she'll accept it or not. They're offering if you take the lock off the gate but leave the gate where it is, and leaving the water flowing the way it is, you would be able to keep the gate. I guess it's to your benefit.

MISS DETTLAFF: A gate without a lock doesn't change anything.

THE COURT: You can put signs on the gate, no hunting allowed and all that sort of thing. You can do that.

MISS DETTLAFF: Your Honor, the person who broke in cut the bolt lock on the gate so even the gate itself isn't sufficient but it is some warning.

THE COURT: It is a hazard living out in the country, I know. I live in the country and I guess the only way you can protect yourself is to have big dogs or something because when you live out in the country, you do, if strangers come up when you're not there, they're liable to do that sort of thing, and I don't know what kind of gate you'd have to put in that would prevent them if they can cut bolts and chains and all that sort of thing to get into your property.

MISS DETTLAFF: Now, if I move the gate, your Honor, all the other property is at more risk than mine. It was really – I thought it was a mutual benefit. That's all.

THE COURT: It creates a gated community. Actually, you'd think you'd want that. I agree with you.

MISS DETTLAFF: You would think so but not at the price I'm asked to pay for it.

MR. KILCULLEN: My only thinking was a gate is better than no gate. An unlocked gate is better than no gate. Then I , you know, I guess we're willing to come back.

MISS DETTLAFF: Wait a minute, are you saying we have to come back tomorrow just for these two issues?

MR. GALLAGHER: If we can't resolve it now.

MISS DETTLAFF: Why can't we resolve it? What is the problem of just taking the gate down?

MR. GALLAGHER: Can we leave the water flowing where it's flowing?

MISS DETTLAFF: Well, it's not flowing where it used to flow but if he wants to – it doesn't matter to me. If he wants it down at the barn rather than down at the house, that's his choice.

MR. HADDOCK: When it leaves the spring it goes through the culvert, it goes down the side of the way of necessity, it goes down to that collection where the concrete and steel grate is and makes a turn.

MISS DETTLAFF: It can't make the turn anymore. I'm not willing to maintain 201 feet of –

MR. HADDOCK: It makes the turn back on to my side, the way it's going right now.

MISS DETTLAFF: Wait a minute. It comes straight across, yes, just the way it's going right now.

MR. HADDOCK: Can I borrow your sign?

MR. GALLAGHER: Sure.

MR. KILCULLEN: I know we're keeping the Court a little bit late, your Honor.

MR. HADDOCK: Right now the spring is here. The water goes through this culvert and runs down this side, and then you have the concrete collection right here.

MISS DETTLAFF: Right. Right.

MR. HADDOCK: That collection turns all the water back on to my side. Here's my barn. Is that correct?

MISS DETTLAFF: Yes.

MR. HADDOCK: And then you knock the little dam out and the water goes right there, right?

MR. GALLAGHER: Right.

MR. HADDOCK: It used to go this way. It no longer does that.

MISS DETTLAFF: No. It never went that way in the past.

MR. HADDOCK: I'm all for that. Let's don't do that anymore because that's a hassle for you and I don't want to be here again.

MISS DETTLAFF: Okay.

MR. HADDOCK: So I'm content for it to end right at my barn because I've already gone and dug a ditch to get rid of it so it's no longer an issue to me. But I cannot – I cannot – you want to divert the water up here and go underneath my stainless tank. When it goes underneath the stainless tank it erodes that and then it goes down this way to the house. That is unacceptable. And if we have to come back tomorrow to stop it from going to the house, that's what we have to do.

MISS DETTLAFF: Okay, and all I want the Court to understand to be a matter of record was that this is a modification for my neighbor's benefit. It's a modification from what the original road was. Lee White's testimony, if you want to go back over his testimony, it used to go down through that gully. Now, what we're saying here is as long as this Court rules – wants to rule that this modification is okay, then okay, then let's do it. If it causes me a little extra problem –

THE COURT: If that will save everybody some time and expense, then I'll so rule that Mr. White said it was channelled down through the culvert underneath the road.

MISS DETTLAFF: See, he was referring to the upper roadway.

THE COURT: I know but you just made me an offer and I accepted your offer. I don't want you to incur another thousand dollars in attorney fees.

MR. KILCULLEN: Okay, so it sounds and as far as the gate –

MR. GALLAGHER: The gate will be moved onto her property. Then she can put a lock on it and she'll be okay.

MR. KILCULLEN: And it looks like the Court can just issue whatever ruling it wants.

THE COURT: Well, who is going to prepare the declaratory judgment?

MR. KILCULLEN: I will be happy to prepare that, your Honor.

THE COURT: Is there any reason for counsel or the parties to return in the morning? Are there anymore issues in the case?

MR. KILCULLEN: No, I don't think so, your Honor.

THE COURT: Well, you prepare the declaratory judgment and if I don't like the wording of it, I'll rewrite it.

MR. KILCULLEN: Sure. And I'll submit it to Mr. Gallagher before I tender it to the Court.

[END OF TRIAL COURT TRANSCRIPT]

Appendix E

Oregon Court of Appeals Judgment
8 1/2 x 11 Original necessitated this retyped verbatim copy to conform with U.S. S.Ct. Rules 33-(b), 33-(c).

FILED: MARCH 7, 2001

IN THE COURT OF APPEALS OF THE STATE OF OREGON

NANETTE M. DETTLAFF,	)	
	)	Douglas County Circuit
Appellant,	)	Court No. 98 CV 2955C
v.	)	CA A107884
PAUL HADDOCK, SHERYL	)	
HADDOCK, and SUSAN	)	
CALLAHAN,	)	
	)	
Respondents.	)	

Date argued or submitted on briefs: February 2, 2001.

Before: Landau, Presiding Judge, and Linder and Brewer, Judges

Attorney for Appellant: Nanette M. Dettlaff, *pro se*

Attorney for Respondents: John F. Kilcullen

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

[ ] No costs allowed.
[x] Costs allowed, payable by: Appellant

Appendix F

Oregon Supreme Court Judgment On Petition for Review
8 1/2 x 11 Original necessitated this retyped verbatim copy to conform with U.S. S.Ct. Rules 33-(b), 33-(c).

IN THE SUPREME COURT OF THE STATE OF OREGON

NANETTE M. DETTLAFF,)
Appellant/Petitioner) ORDER DENYING REVIEW
)
) CA A107884
v.) SC S48466
)
PAUL HADDOCK)
Respondent/Respondent)
SHERYL HADDOCK)
Respondent/Respondent)
SUSAN CALLAHAN,)
Respondent/Respondent)

The Court has considered the petition for review and orders that it be denied.

DATE: August 7, 2001.

/S/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

COPIES TO:

NANETTE M DETTLAFF	Attorney for Appellant/Petitioner
JOHN F KILCULLEN	Attorney for Respondent/Respondent

This computer-generated case caption may not comply with ORAP 2.05(1) & 5.05(5

Appendix G

Oregon Trial Court Expert Witness (Dr. Spigolon) Report, Exhibit 11. 8 1/2 x 11 Original necessitated this retyped verbatim copy to conform with U.S. S.Ct. Rules 33-(b), 33-(c).

S. JOSEPH SPIGOLON, PH.D., P.E. Phone: (541)267-4371
GeoEngineering Consultant Fax: (541)267-8224
2220 N. 13th COURT SSPIGOLO@OREGONVOS.NET
COOS BAY, OREGON 97420

GEOTECHNICAL ENGINEERING REPORT

SUBJECT: Evaluation of Potential Landsliding and Roadway Deterioration, Dettlaff Property, Douglas County, Oregon

CLIENT: Ms. Nanette M. Dettlaff, 1094 Elk Ridge Forest Road, Reedsport, OR 97467

DATE: April 20, 1999

PURPOSE AND SCOPE OF REPORT. MS Nanette M. Dettlaff owns a house and adjoining property in the valley of Bickford Creek, a tributary of Lake Creek, in the Ash Valley region south of Loon Lake in western Douglas County , Oregon. An unpaved roadway in an easement (way of necessity) provides access to her house from Elk Ridge Forest Road. The roadway, maintained by Ms. Dettlaff has a centerline distance of 1760 feet (0.33 miles). Several sections of the roadway were formed by cutting a bench into the steep hillsides.

During April and May of 1997, landowners adjacent to the roadway easement clearcut-logged two areas near to, and above, the roadway. During and after the logging operatrions, heavy logging/ construction-type equipment has been operated on the subject roadway. These actions have caused concern on the part of Ms. Dettlaff with regard to (a) apparent destruction of the roadway surface, and (b) the potential for a landslide at one of the clearcut zones. The latter would effectively destroy the roadway at that poiint and eliminate access to the house and property.

In July 1998, Ms Dettlaff asked this writer to examine the roadway and the clearcut-logged areas to evaluate the potential for landsliding and to observe the condition of the roadway surface. This writer inspected the roadway on July 28, 1998. A follow-up inspection was made on April 11, 1999, to observe the effect of the winter rains on the road surface. This report presents (a) the results of a geologic literature search, (b) the results of research into the literature of the effect of clear cutting on landsliding, (c) observations made during the two site inspections, and (d) a discussion of the potential for landsliding and roadway deterioration.

LOCATION OF ROADWAY AND HOUSE SITE. The roadway and the Dettlaff house are located in the NW1/4, SW1/4, Section 13 and the NE1/4, SE1/4, Section 14 of Township 25S, Range 10W, Willamette Meridian. This is an area of steep hillsides and fairly narrow valleys. The roadway drops from about elevation 740 m.s.l at the intersection with Elk Ridge Forest Road to about elevation 420 at the house, a drop of about 320 feet in a distance of 1760 feet.

GEOLOGICAL SETTING. The near-surface geology of the Dettlaff site is an important factor in the evaluation of the potential for landsliding. The geologic literature[1],[2] indicates the bedrock underlying the area of the roadway site, and a large area to the north and west, is the Tyee formation of Tertiary age, a "feldspathic and micaceous massive-bedded sandstone and subordinate siltstone."

As described in the Soil Conservation Service literature[3] , the upper surface of the sandstone has been weathered to unconsolidated materials ranging from clayey and silty sand to silty clay and medium plasticity clay. This type of weathered soil surface is to be expected because the sandstone grains weather to a sand and the feldspar weathers to clay, with the proportions of each dependent on the feldspar content of the parent rock at each locality. The thickness of soil over the bedrock ranges from none to as much as 30 feet or more. During and after weathering-soil formation, erosion modifies the thickness and configuration of the soil surface.

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[1] Wells, F.G. and Peck, D.L. (1961). "Geologic Map of Oregon West of the 121st Meridian," MAP I-325, USDI, Geological Survey, Reston, VA. and the Oregon Department of Geology and Mineral Industries, Portland.

[2] Orr, E.L., Orr, W.L., and Baldwin, E.M. (1992) *Geology of Oregon*, Kendall/Hunt Publishing Company, Dubuque, Iowa, Fourth Ed.

[3] Natural Resources Conservation Service, (1994). Unpublished soil interpretation records for various soil series." Ash Valley area, western Douglas County, Oregon. USDA-Soil Conservation Service Regional Office, Roseburg, Oregon.

EFFECT OF CLEARCUTTING ON LANDSLIDING. Trees at the surface of a residual soil (weathered in place) provide a strengthening effect due to two factors: (a) the roots act as an interlocking reinforcement system, similar to thin piles, and (b) evapotraspiration from the leaves sucks water from the soil, increasing its strength from negative pore water pressure due to partial saturation. Furthermore, the forest canopy acts as an "umbrella" that disperses the effects of intense storm events, reducing erosion effects due to heavy runoff.

Clearcut logging at the top of a steep slope has the potential to significantly reduce the strength of the surface soil layer, which may then lead to a landslide. After a few seasons, the roots begin to decay, substantially reducing their reinforcement capability. With a reduction of root suction, the water content of the soil can then rise, leading to an appreciable loss of strength. This loss is most sizable in the more clayey soils such as those found in the roadway area.

The intense winter storms of February and November/December 1996, triggered more than 100 landslides in the U.S. Highway 38- Umpqua River region of Douglas County. Studies of the landslides made by several governmental and citizen-interest organizations showed that the great majority of the slides were associated with logging roads, clearcut logging, or a combination of the two.

ROADWAY OBSERVATIONS. This writer made two inspection trips to the roadway site almost a year apart, to observe the potential for landsliding at a critical location in the roadway and the effect of a winter's weather on the surface of the road.

July 28, 1998 Inspection. A number of photographs were made of the road surface. The roadway starts at survey station 10+00 at the intersection with Elk Ridge Forest Road and proceeds downward. The gate to the Dettlaff easement is at station 11+40 and the house at station 27+60. The road surface consisted of two wheel tracks with a thin surface layer of 3/4- inch crushed stone. The general condition on the road surface was good, i.e., there were no ruts or other evidence of overloading. Road cuts contained soils of a type that were in good general agreement with the geological setting described above. Clayey silt and silty clay, sometimes containing gravel (unweathered rock particles?), were seen in the cuts at several locations.

At about station 20+10 to station 21+40 there is a steep hillside with a logged-clearcut at the top. Apparently trees had been cut almost to the roadway. Several lengths of the slope had been cut nearly vertical during construction of the road. The average of the slope of the hillside, measured with a clinometer, was about 85% to 100% (40^{o} to 45^{o}). The downhill slope, measured at about 100% (45^{o}), is directly above the adjacent landowner's stockbarn. The trees on the downhill slope are generally vertical, indicating the lack of soil creep.

April 11, 1999, Inspection. A number of photographs were made of the road surface at several of the same locations as in the July 28, 1998, inspection. The difference in the condition of many sections of the road was dramatic - there was appreciable degradation of the surface. Ms. Dettlaff had difficulty negotiating sections of the road while driving from her house to the gate area. There was no appreciable change in the condition of the road in the clearcut area at about station 21+00.

DISCUSSIONS AND CONCLUSIONS. The following discussion, conclusions and engineering recommendations are based on the geologic information and personal observations described above.

Condition of Roadway Surface. A roadway cut into a firm soil subgrade and then topped with a thin gravel surface is sufficient, in most cases, to support automobile-sized vehicles. When a wheel rolls over the surface, it acts as a rolling footing. The bearing capacity of the roadway depends on the weight on the wheel's contact area and on the thickness of the base course - a few inches of gravel in this case. If the bearing pressure is too great, or if there is a degradation of the strength of the subgrade, there will be a classic bearing capacity failure, resulting in a rut.

It appeared that heavy construction-type equipment probably rubber-tired, had overloaded several sections of the road and caused ruts. Most of those sections of the road appeared to have been scraped on the uphill side by some type of machinery to remove and/or level the ruts. However, the rutting and re-grading have destroyed the original gravel surface course at those locations and probably also destroyed much of the load-bearing ability of the subgrade soils. Without extensive re-grading and without the application of additional crushed stone, it is doubtful that the automobile traffic ability of the road can be maintained at the level observed during the July 28, 1998, inspection.

Landslide Potential. The near-surface soil profile and the shear strength of the soils in the potential slide zone at station 21+40 are not known sufficiently well for stability analysis. However, all of the ingredients are present for a landslide: (a) a steep slope, (b) clayey soil (of unknown depth and strength), and (c) a recent clearcut that has removed the strengthening factors of the moisture suction ability, and root reinforcement, of the trees. Therefore, the possibility for a landslide exists although the probability cannot be assessed.

If a slide occurs it may take one of two forms, dependent on the stratification and strength profile of the soils in the slope:

(1) There may be a shallow slide whose toe is at or above the level of the road. If this occurs then the debris from the slide will cover the roadway, making it impassable until the debris is removed.

(2) There may be a deep-seated slide whose toe daylights downhill of the road. This is the more likely of the two types. If this slide occurs, there will be the necessity for a much more involved repair, probably involving removal of all slide

material to the rock surface and replacement with crushed rock. Also, some of the debris may reach the stock barn at the foot of the lower slope.

In either case, the occurrence of a slide at this location will effectively isolate the Dettlaff house because there is no other roadway available.

Mitigation of Landslide Potential. This writer has recently served as a geotechnical engineer on the design of repairs to about 15 landslides on U.S. Forest Service roads in southern Oregon. The soil and topography conditions at most of those slides are very similar to the conditions of the potential slide zone at station 21+00. The prevention of sliding at that location can be accomplished by any one of three mitigation measures:

(1) **Flatten the Slope**. The general slope of the uphill portion of the site can be reduced to a safe level, probably on the order of 1.5 H to 1 V or flatter. This can be accomplished by cutting a single slope or by benching into the hillside. The cost will depend on the cost and availability of machinery and personnel, and cost to dispose of the excavated material. It probably will be well over $20,000.

(2) **Re-align the Road into the Hillside**. If a subsurface investigation discloses that there is stable material in the interior of the slope, then a re-alignment of the road into the hillside may be feasible. This will involve removal of soil and rock and creation of a new section of roadway into the uphill section of the slope, requiring either substantial stability in the new uphill slope or a benching as described in (1) above. This is the most secure of the systems proposed here because the roadway would be farther away from the downhill slope. The cost can range from $20,000 to over $50,000, plus the cost of investigation and design.

(3) **Use a Retaining Wall**. A retaining structure of some type can be used to support the uphill slope and prevent sliding. This will be feasible only if a subsurface investigation discloses that the mode of failure will be the shallow slide rather than the deep-seated slide described above. If deep-seated, the wall would serve no purpose. Several types of retaining structures would be available, from a rock

enbankment to a concrete stem wall. The cost is expected to be at least $50,000 plus the cost of investigation and design.

LIMITATIONS. This report has been prepared for the exclusive use of Ms. Nanette M. Dettlaff,, owner of the subject property, and/or her designates for specific application to the evaluation of potential landsliding and roadway deterioration, at her property in Douglas County, Oregon. No other use is authorized without this writer's written authorization.

Warranty. This writer warrants that the observations and recommendations presented in this report are based solely on a visual examination of the site and a review of existing literature pertaining to the geology of the site, which was the agreed-upon scope of service between this writer and Ms. Nanette M. Dettlaff, owner of the property. This report has been prepared using generally accepted procedures of geotechnical (soil and foundation) engineering. This warranty is in lieu of all other warranties, expressed or implied. This writer has not conducted any observation, study, examination, investigation, or test that is not specifically described above and, therefore, will not be liable for failing to discover any condition whose discovery required the performance of services not authorized by the agreement.

Closure. It has been my pleasure to have been of service to you through this investigation. Should you have any questions or need of additional information, please do not hesitate to contact me by phone at (541)267-4371, fax at (541)267-8224, or email at sspigolo@oregonvos.net.

(Seal and Signature) Registered Professional Engineer No. 13,617. Oregon.

SUMMARY OF PROFESSIONAL QUALIFICATIONS

AREAS OF SPECIALIZATION

Dr. S. J. Spigolon is a geotechnical and materials engineer with over 40 years of engineering experience, including 15 years of university teaching, and over 25 years of private consulting that included ownership of a commercial testing laboratory and several years of contract research experience. His areas of specialization include:

- Geotechnical engineering for foundations, retaining structures, and earthwork (earth dams, embankments, cut slopes, etc.) -- design investigations tests, reports construction monitoring.

- Planning and managing subsurface investigations, conducting pile load trests.
- Conducting structural loading test; failure analyses; experimental stress analyses.
- Construction materials -- research and development -- testing and inspection programs.
- Wetland soils engineering.
- Soil degreadability studies.

EDUCATION :

Ph.D. University of Illinois 1963 (Geotechnical Engineering)
M.S. University of Mississipi 1956 (Civil Engineering)
B.S.C.E. University of Mississipi 1951 (Civil Engineering)

SUMMARY OF PROFESSIONAL EXPERIENCE:

Dr. Spigolon is co-author of an engineering materials text, is the author of over 40 published technical papers, and has written several published and unpublished research reports for the US Army Engineer Waterways Experiment Station and other organizations. He has prepared well over 600 geotechnical engineering reports that were submitted to commercial clients.

He is a registered as a professional engineer in Mississippi and Oregon.

For the past 26 years, for private commercial clients, he has prepared geotechnical engineering foundation designs, subsurface investigation and structural damage evaluation reports, and has testified as expert witness in lawsuits involving geotechnical, environmental, and construction materials disputes.

Since 1986, he has been a geotechnical engineering consultant with Southcoast Corporation (formerly SJS Corporation) in Coos Bay, Oregon. His clients have included governmental and private firms throughout the U.S., including several engineering and architectural firms located in southwestern Oregon. From **1969 to 1986** his engineering practice was located in Memphis, Tennessee.

As a contract consultant from 1982 to 1996 he prepared several major contract research reports for the US Army Engineer Waterways Experiment Station (WES), Vicksburg, MS. The research included being a co-author of the Wetlands Engineering Manual, quality assurance for slurry trenches, two dredging-related geotechnical expert system programs, and studies of dredging operations, including causes of changed site conditions claims. He has recently been a lecturer on soil compaction at the annual Earthwork Inspector's Course presented at WES.

From **1981 to 1983**, he was a Professor of Civil Engineering at Memphis State University (now the University of Memphis). He taught undergraduate and graduate courses in geotechnical engineering and engineering statistical methods.

For over eight years, during **1972 to 1981**, he was a principal owner of Spigolon Engineering Laboratories (later Spigolon-DISC), a geotechnical engineering and materials testing firm in Memphis, TN. He prepared geotechnical engineering and structural failure investigation reports for several hundred construction projects, including several major facilities in the Mid-South, and investigated soil contamination at several toxic materials storage sites.

From **1969 to 1972**, he was manager of the Memphis Branch, and Corporate Director of Engineering, for Barrow-Agee Laboratories in Memphis, T. He prepared geotechnical engineering reports for projects in the southeastern U. S. And directed construction materials testing and inspection for projects in the Memphis area.

During **1964 to 1969**, he was at Memphis State University (now the University of Memphis) as Assistant Dean of Engineering, Chairman of Engineering Science, and Professor of Civil Engineering. He taught graduate and undergraduate courses in geotechnical and materials engineering and engineering statistical methods. He also maintained a part-time consulting practice.

From **1955 to 1964**, he was an Assistant, and Associate, Professor of Civil Engineering at the University of Mississippi. He did research for the Mississippi State Highway Department in highway soils and in continuously-reinforced concrete pavements.

Following military service, he worked for one year (**1954-55**) as a construction materials inspector with Pittsburgh Testing Laboratory, St. Louis, MO.

Appendix H

Way of Necessity Deeds of Record, petition through granting. 8 1/2 x 11 Original necessitated this retyped verbatim copy to conform with U.S. S. Ct. Rules 33-(b), 33-(c).

BEFORE THE BOARD OF DOUGLAS COUNTY COMISSIONNERS (D.C. VOL 42, PG.571-573)

In The Matter of Establishing a)
Statutory Way of Necessity for)
the Benefit of LEONARD H.)
WHITE and ELLEN WHITE,) Petition to Establish Way
husband and wife, owners of real)
property herein described as Parcel)
I, in Douglas County, Oregon.)

Come now, LEONARD H. WHITE and ELLEN WHITE, and petition the Douglas County Board of Commissioners and represent as follows:

I.

The undersigned petitioners are the contract purchasers and owners of the following described real property, to-wit: Beginning as a point on the east line of Section 14, Township 23 South, Range 10 West Willamette Meridian, 16.25 chains South of the Government quarter corner on said line; thence running South 74 1/2° West 41 chains; thence South 6 1/2 chains; thence North 74 1/2° East 9 chains; thence North 65° East 6 chains; thence North 74 1/2° East 5 chains; thence North 84 1/2° East 5 chains; thence North 50° East 6 3/4 chains ; thence South 60° East 5 chains; thence North 62 1/2° East 7.20 chains to intersection of said East line of said Section 14; thence North along said Section line 6 1/2 chains to the point of beginning in Douglas County Oregon.

That O.E.Glazebrook and Josephine Glazebrook are the contract sellers of said real property to petitioners and hold the title thereto in trust for petitioners' benefit. That your petitioners make their home on said real property. That said real property is separated from the Elk Ridge Road, a public road of the State of Oregon that is located in the SW 1/4 of the NW 1/4 of Section 13, Township 23 South, Range 10 West of the Willamette Meridian, Douglas County, Oregon; and likewise said real property is separated from the Loon Lake Road, a public road in the NE 1/4 of the SW 1/4 and in the SE 1/4 of the NW 1/4 of said Section 13. That there are no other public roads provided by law which can conveniently be reached by your petitioners from their said real property. That it is necessary that the public and your petitioners have ingress to and egress from their said real property.

II.

That the apparent owners of the Southwest quarter of the Northwest quarter and the Northwest quarter of the Southeast quarter of said Section 13, Township 23 South, Range 10, West of the Willamette Meridian, Douglas County, Oregon, which real property intervenes between said Elk Ridge Road and the real property described as Parcel I owned by your petitioners are Wesley W. Harrison and Shirliann Harrison, husband and wife.

WHEREFORE, your petitioners respectfully request the Board of Douglas County Commissioners to:

1. Appoint a Board of County Viewers to establish a way between said Elk Ridge Road and the real property described as Parcel I owned by the petitioners hereto, all as provided in ORS 376.105 *et seq*.

2. Causing an order to be issued directing the viewers to meet at a time not less than 10 days from the making of the order.

3. Make an Order notifying the above named owners of the intervening land across which a roadway is to be established of the time and place of the meeting.

DATED this 7th day of November, 1972.

PETITIONERS:
(signature)
LEONARD H. WHITE
(signature)
ELLEN WHITE

STATE OF OREGON) ss.
County of Coos)

I, LEONARD H. WHITE, being first duly sworn, say that I am one of the petitioners in the within entitled cause and that the foregoing PETITION is true as I verily believe.

(signature)
LEONARD H. WHITE

SUBSCRIBED and sworn to before me this 7th day of November 1972.

(Signature illegible)
Notary Public for Oregon
My commission Expires: 9-29-75

BEFORE THE BOARD OF DOUGLAS COUNTY COMMISSIONERS (D.C. Vol 42,Pg.569,570)

In The Matter of Establishing)
a Statutory Way of)ORDER APPOINTING
Necessity for the benefit of)BOARD OF COUNTY
LEONARD H. WHITE and)VIEWERS, DIRECTING
ELLEN WHITE, husband and)MEETING OF VIEWERS
wife, owners of real property)AND ORDERING
herein described as Parcel I, in)NOTIFICATION OF LAND
Douglas County, Oregon.)OWNERS

THE ABOVE MATTER coming on regularly to be heard by the Board of Douglas County commissioners on the filing herein of a Petition to Establish a Way of Necessity for the use and benefit of Leonard H. White and Ellen White as contract purchasers and owners of the following described real property, to-wit:

> Beginning as a point on the east line of Section 14, Township 23 South, Range 10 West Willamette Meridian, 16.25 chains South of the Government quarter corner on said line; thence running South 74 1/2° West 41 chains; thence South 6 1/2 chains; thence North 74 1/2° East 9 chains; thence North 65° East 6 chains; thence North 74 1/2° East 5 chains; thence North 84 1/2° East 5 chains; thence North 50° East 6 3/4 chains ; thence South 60° East 5 chains; thence North 62 1/2° East 7.20 chains to intersection of said East line of said Section 14; thence North along said Section line 6 1/2 chains to the point of beginning in Douglas County Oregon.

IT IS HEREBY ORDERED that:

1. George E. Grubb, Douglas County Roadmaster, C. J. Licklider, and Norman Rydell, are hereby appointed to constitute a Board of County Road Viewers who shall view locate and mark out either a suitable public road not exceeding 60 feet wide or a gateway not less than 10 nor more than 30 feet wide, or both as may be found best by the viewers, having

regard to all surrounding circumstances and conditions of the case, and so as to do the least damage to the land through which the road or gateway is located from the residence of petitioners, Leonard H. White and Ellen White, to the nearest point practicable on the public road known as the "Elk Ridge Road" or to the nearest point practicable on the public road known as the "Loon Lake County Road".

2. The Viewers shall assess the damages sustained by the property over which said road or gateway passes.

3. The Viewers shall make a report to the County Board of Commissioners at its next regular session, of the public road or gateway location , the amount of damages assessed and the persons entitled to such damages.

IT IS FURTHER ORDERED that the Viewers shall meet on the 18th day of December, 1972 at the hour of 9:30 a.m., at the approximate location of the public road or gateway requested by petitioners in this proceeding and to carry out the provisions of this order.

IT IS FURTHER ORDERED that Wesley Harrison and Shirliann Harrison , as the record title holders of said intervening property over which said road or gateway shall pass be notified of the time and place of the meeting of the Viewers as hereinabove provided, said notice to be given not less than 10 days from the making of this order.

DATED this 6th day of December, 1972

DOUGLAS COUNTY BOARD OF COMMISSIONERS
(signature illegible)
CHAIRMAN
(signature illegible)
COMMISSIONER
(signature illegible)
COMMISSIONER

VIEWERS REPORT ON THE ESTABLISHMENT OF A STATUTORY WAY OF NECESSITY IN THE NE1/4 SE1/4 OF SECTION 14, T23S, R10W, W.M. AND IN THE NW1/4 SW1/4 OF SECTION 13, T23S, R10W, W.M. IN DOUGLAS COUNTY, OREGON (D.C. BK. 42, Pg. 721)

TO: Douglas County Board of Commissioners

Gentlemen:

We, the undersigned viewers, appointed by Order dated December 6, 1972 to view out, locate, mark out and assess damage on a statutory way of necessity pursuant to O.R.S. 376.105, did meet at Elkton , Oregon at 9:30 A.M., December 18, 1972. We then traveled to the site and proceeded to view out the route for a statutory way of necessity.

The undersigned viewers have found:

1. That a Gateway Road thirty (30) feet in width should be established.

2. That the Gateway Road to be established would be partially located upon property other than that set forth in the "Petition to Establish Way" by the petitioners Leonard H. and Ellen White.

3. That the other party to be enjoined by these proceedings is U.S. Plywood Corporation, Box 672, Eugene Oregon.

It is a further recommendation by the board of viewers that the viewers report of assessed damages and the description of the Gateway Road be held until the other party to the proceedings can be notified as set forth in O.R.S. 376.105.

Dated this 21st day of December, 1972
Respectfully submitted,

(signature George E. Grubb)
Viewer
(signature C.J.Licklider)
Viewer
(signature Norman A. Rydell)
Viewer

VIEWERS REPORT ON THE ESTABLISHMENT OF A STATUTORY WAY OF NECESSITY IN THE NE1/4 SE1/4 OF SECTION 14, T23S,R10W, W.M. AND IN THE NW1/4 SW1/4 OF SECTION 13, T23S, R10W, W.M. IN DOUGLAS COUNTY, OREGON (D.C. Vol.44,Pg.73;BK.525,pg735-end: included survey drawing by county roadmaster which cannot be converted to satisfy S.Ct. rules 33(b),33(c),thus omitted here)

TO: Douglas County Board of Commissioners

Gentlemen:

We, the undersigned Viewers, appointed by Order dated December 6, 1972 to view out, locate, mark out and assess damages on a statutory way of necessity pursuant to O.R.S. 376.105 and having filed an initial viewers report dated December 21, 1972 in which the necessity was found to name another party to these proceedings do now present this report of damages assessed and other recommendations.

The undersigned viewers have found:

1. That the Gateway Road Thirty (30) feet in width be established as follows: beginning at a point in the center of the Elk Ridge Road from which the quarter section corner between Sections 13 and 14, T23S R10W, W.M. bears N8 °W, 249.2 feet, thence S14°E, 140.2 feet, thence S55°W, 87.3 feet, thence S 54°W , 88.7 feet, thence S14 °E, 87.3 feet, thence S10°E, 81.6 feet, thence S20°E, 54.1 feet, thence S 66°W , 41.7 feet, thence east 86.0 feet, thence S76°E, 80.0 feet, thence S60°W, 150.0 feet, thence S85 °E, 57 feet, thence S32°W, 56 feet, thence S35°W, 52 feet, thence S31°W, 85 feet, thence S68°W, 57.0 feet, thence S68°E, 52.0 feet, thence N81°E , 37.0 feet, thence N64°E, 147.0 feet, thence s32°W, 123.0 feet to a point on the section line between Sections 13 and 14 T23S, R10W W.M.

2. That the damages resulting from the establishment of the Gateway Road are as follows:

a) Harrison, Wesley and Shirlian
Ash Route
Reedsport, Oregon

0.54 ac. @$200/acre $108.00

b) U.S. Plywood Corp.
Box 672
Eugene, Oregon
0.62 ac. @$200/acre $124.00

3. That all costs of construction be borne by the petitioners Leonard H. and Ellen White, and that all hardwood species of trees cut during the Gateway Road construction on the Harrison property be cold decked at a location on the Harrison property near the Gateway Road entrance to Petitioner White's property.

Dated this 12th day of January, 1973
Respectfully submitted,

(signature George E.Grubb)
Viewer

(signature Norman A.Rydell)
Viewer

(signature C.J.Licklider)
Viewer

U.S. Plywood (D.C. BK 44, Pg.72)
P.O. Box 26
Reedsport, Oregon 97467 Phone 271-3606

June 18,1973

Board of County Commissioners
Douglas County Courthouse
Roseburg, Oregon 97470

re: Objection to Damages in Viewers Report

Gentlemen,

This letter is in reply to the "Viewers Report on Proposed Gateway Road" petitioned by Mr. & Mrs. Leonard H. (Lee) White, dated June 4, 1973.

US PLYWOOD respectfully submits the following damages resulting from the creation of the Gateway Road:

1.400M Douglas-fir @ $100.00/M	$140.00
1.900 M Alder-Maple @ 40.00/M	76.00
0.540 Acres @$200.00/Acre	108.00
TOTAL	$324.00

Very truly yours,

(signature)
Leroy T. Lambert
Resource Forester
Southern Area Oregon

cc: MEkenberg, USP Eugene
GEGrubb, County Engineer Roseburg

IN THE BOARD OF COUNTY COMMISSIONERS OF
DOUGLAS COUNTY, OREGON (D.C. BK.44,Pg.70)

In the Matter of the Petition)
for a Statutory way of)ORDER
Necessity by Leonard White,)
et ux

It appearing to the Board of County Commissioners that statutory way of necessity right of way has been established by order of said Board dated July 18, 1973; and

It further appearing to said Board that money in the amount of $232 is being held in trust by the Douglas County Treasurer for the use of Leonard White and further that Coast Savings & Loan Association money order # CB006245 in the amount of $214 has this date been deposited into said trust fund with the Douglas County Treasurer; and

It further appearing to said Board that said money in the total mount of $446 should be used to pay the damages to property owners of land damaged by said statutory way of necessity right-of-way;

NOW, THEREFORE, IT IS HEREBY ORDERED that the Douglas County Treasurer be and he is hereby authorized and directed to issue checks as follows:

U.S. Plywood Corporation $324.00
P. O. Box 26
Reedsport, OR 97467

Wesley and Sherliann Harrison $122.00
c/o Forrester Taylor
115 South 20th
Reedsport, OR 97467

in payment of said damages by reason of right of way taking for statutory way of necessity.

Dated this 18th day of July, 1973.

BOARD OF COUNTY COMMISSIONERS
OF DOUGLAS COUNTY, OREGON
(signature) Al Flegel, Chairman
(signature) Ray E. Doerner, Commissioner
(signature) L. W. Michaels, Commissioner

IN THE BOARD OF COUNTY COMMISSIONERS OF
DOUGLAS COUNTY, OPREGON (D.C.BK 537, pg.207)

In the Matter of the Petition	)
for a Statutory way of	) ORDER
Necessity by Leonard White, *et ux*	)

It appearing to the Board of County Commissioners that Leonard H. and Ellen White having heretofore petitioned for a statutory way of necessity and all things having been done pursuant to Oregon Revised Statutes, Chapter 376.105, *et seq.*; and

It further appearing to said Board that Viewers' Report dated January, 1973, attached hereto as Exhibit A, signed by George E. Grubb, Douglas County Engineer, with plan and profile, attached hereto as Exhibit B, amending alignment of proposed way of necessity and setting forth assessed damages to the properties of Wesley and Sherlian Harrison and U.S. Plywood Corporation, in the amounts of $122 and $324, respectively, should be accepted, being in all things just; and

It further appearing to said Board that petitioners have paid in full said assessed damages as hereinabove listed.

NOW, THERFORE, IT IS HEREBY ORDERED that the statutory way of necessity petitioned for Leonard White, et ux, as set forth in Exhibits A and B attached hereto be and the same is HEREBY DECLARED to be a perpetual right of way and the County Clerk is hereby authorized and directed to record said Exhibits A and B in the Road and Deed Records of Douglas County, Oregon.

Dated this 18th day of July, 1973.

BOARD OF COUNTY COMMISSIONERS
OF DOUGLAS COUNTY, OREGON
(signature)
Al Flegel, Chairman
(signature)
Ray E. Doerner, Commissioner
(signature)
L. W. Michaels, Commissioner

Appendix I

Trial Court Exhibit 10, road tasks breakdown bid, denied into evidence. (assignment of error 6; Appendix D, Plaintiff's Opening Brief, Oregon Court of Appeals.
8 1/2 x 11 Original necessitated this retyped verbatim copy to conform with U.S. S.Ct. Rules 33-(b), 33-(c).

UMPQUA RIVER NAVIGATION CO.
P.O. BOX 25
REEDSPORT, OR 97467
(541)271-2123 FAX (541)271-2198

April 15, 1999

Nanette M. Dettlaff
1094 Elk Ridge Forest Road
Reedsport, OR 97467

RE: Quotes for roadwork

Dear Ms. Dettlaff:

Umpqua River Navigation Co. would like to quote the following price for work on your roadway.

1. Mobilization of equipment, this is a fix cost whether we work on a short portion of the road or the complete roadway. **$3000.00**

2. Reconstruction of ditches **$0.25 per lineal foot**

3. Removal of stump to an area within the work area **$500.00**

4. Reshape roadway for new rock **$0.40 per lineal foot**

5. Rock roadway to BLM spec. for gravel logging roads would require the above work and 8" of 3"-0" base rock and 4"

of 1 1/2"-0" surface rock. Road width at this location would vary from 10 foot wide in the straight and 12 to 14 feet wide on the corners and require the work above, (1-4). **$25.42 per cubic yard** or approximately **$13.85** per lineal foot of roadway.

6. Rocking roadway for light traffic instead of the logging road, would require the above work, (1-4) and 3"-4" of 1 1/2"-0" surface rock to repair existing road. The price for the rock surface would be **$25.55 per cubic yard** or approximately **$4.65** per lineal foot.

7. Remove & replace culverts if needed **$500.00 each**

The above prices will allow you to estimated the cost for rebuilding any portion of the roadway you wish and the option of the rock surface required for a light duty road or an all season logging road. The following distance were measured along the centerline of the existing road on April 12th.

1000 rd. to property line	**245 feet**
property line to gate	**180 feet**
gate to property line (this area has the stump removal)	**548 feet**
property line to culvert near water tank	**253 feet**
culvert near water tank to house	**511 feet**

If you have any questions or need more information, please call me at 541-271-2123.

Sincerely,

(signature)
Stan Washington
Umpqua River Navigation Co.

SAND – GRAVEL – READY MIX - ASPHALT – CONSTRUCTION
Serving The Southwest Oregon Coast Since 1889

Appendix J

Publication in Geology, April, 2000 (peer-reviewed journal)
8 1/2 x 11 Original necessitated this retyped verbatim copy to conform with U.S. S.Ct. Rules 33-(b), 33-(c).

FOREST CLEARING AND REGIONAL LANDSLIDING [1]

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ABSTRACT

The influence of forest clearing on landsliding is central to long-standing concern over the effects of timber harvesting on slope stability. Here we document a strong topographic control on shallow landsliding by combining unique ground-based landslide surveys in an intensively monitored study area with digital terrain modeling using high-resolution laser altimetry and a coarser resolution regional study of 3224 landslides. As predicted by our digital terrain–based model, landslides occur disproportionately in steep, convergent topography. In terrain predicted to be at low risk of slope failure, a random model performs equally well to our mechanism-based model. Our monitoring shows that storms with 24 hr rainfall recurrence intervals of less than 4 yr triggered landslides in the decade after forest clearing and that conventional monitoring programs can

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[1] Geology; April 2000; v.28;no.4;p311-314; 5 figures

substantially underestimate the effects of forest clearing. Our regional analysis further substantiates that forest clearing dramatically accelerates shallow landsliding in steep terrain typical of the Pacific Northwest.

Keywords: landsliding, debris flows, forestry, erosion.

INTRODUCTION

For more than a century associations between forest cutting and landsliding have been interpreted as evidence that forest clearing accelerates erosion in mountainous terrain (Lyell, 1853). The widespread use of aerial photography in forest management has led to many studies that concluded that forest clearing dramatically accelerates rates of landsliding over rates in undisturbed forest (Sidle et al., 1985). However, quantitative estimates of the effect of timber harvest on landslide rates have been challenged because the difficulty in detecting small landslides under a forest canopy could impart a bias to aerial photograph inventories (Pyles and Froehlich, 1987; Robison et al., 1999). In addition, the timing of storm events relative to forest practices is variable and most studies cover only a single watershed, a situation that has contributed to variations in the reported influence of timber harvest on rates of landsliding. Here we combine comprehensive, ground-based mapping of postharvest landslides in a small watershed with a regional analysis to evaluate the relation of contemporary and longer term rates of landsliding.

METTMAN RIDGE LANDSLIDING

Repeat mapping of a 0.43 km^2 area along Mettman Ridge near Coos Bay, Oregon, provides a unique record of postlogging slope instability in which all landslides were documented over a 10 yr period (Fig. 1). The study area burned in the late nineteenth century, was clear-cut logged in 1987, and replanted in 1988. Mettman Ridge is underlain by Eocene sandstone and the colluvial soil is close to cohesionless, the net soil cohesion being dominated by root strength (Schroeder and Alto, 1983; Schmidt, 1999)

In December 1989, channels, landslide scars, and colluvial deposits in topographic hollows were mapped by walking the entire study area (Montgomery and Dietrich, 1992, 1994). Most subsequent landslides were mapped in the field, although several of the 1996 landslides were mapped from low-altitude aerial photographs. We identified 16 landslide scars during initial mapping in 1989. Although we do not know the absolute ages of these scars, their fresh appearance and the lack of stumps or logging slash within the scarps indicated that they postdate logging; therefore, the landslides occurred between 1987 and 1989. Five additional landslides occurred in 1990, three in 1991, five in 1992, one in 1993, and five more during the storm of record in November 1996. All of the landslides extended to near the soil-bedrock interface, and 30 of the 35 landslides occurred in topographic hollows that define the axes of unchanneled valleys. Ten of the landslides were associated with drainage from a ridgetop road. Due to rapid regrowth of understory vegetation none of the pre-1996 scarps are discernable on low-altitude (1:2400 scale) aerial photographs flown in January 1997.

Landslides in shallow soil typically occur during intense or long-duration storms (Caine, 1980), and two intensity-duration thresholds are apparent at Mettman Ridge for slide-producing storms from 1987 to 1998 (Fig. 2). Caine's (1980) global threshold for widespread landsliding works well for defining an upper bound to storms that did not produce landslides in our mapping area, and a lower rainfall intensity-duration threshold fits the lower bound of the storms that triggered landslides. Piezometric observations at an intensively instrumented hollow on Mettman Ridge indicate that pore-water pressures, and hence landslide initiation, are sensitive to hourly rainfall bursts (Montgomery et al., 1997; Torres et al., 1998) but we lack a historical rainfall record with temporal resolution finer than 24 hr.

The maximum 24 hr rainfall in years during which landslides were documented ranged from a recurrence interval of <2 yr to the largest on record (Fig. 3). The 1996 storm was the 24 hr storm of record, with 16 cm day^{-1} at the North Bend gauge (and >14 cm day^{-1} at a Mettman Ridge rain gauge that was destroyed by a 1996 debris flow), but other landslide-producing storms had 24 hr rainfall recurrence intervals of 3–4 yr and 1–2 yr based on the 65 yr record from the North Bend gauge. However, the maximum hourly rainfall at Mettman Ridge (13 mm) was comparable to the maximum hourly intensitites for the smaller landslide-producing storms of 1990 and 1992 (10 and 16 mm hr^{-1}). The relatively modest number of landslides in the storm of record may reflect hourly rainfall intensity, prior failure of the most susceptible areas, and regeneration of root strength 9 yr after cutting. In contrast, more than half of the landslides observed since direct monitoring began occurred from 3 to 5 yr after cutting. The low intensity-duration threshold for Mettman Ridge after timber harvest and the observation that nearly half of the landslides occurred during rainstorms with a <4 yr 24 hr recurrence interval show that common storms can trigger landslides in the decade following cutting in steep, landslide-prone terrain.

The average recurrence interval for landsliding from hollows is the product of the number of hollows and the period of observation divided by the number of hollows in which landslides occurred during the monitoring period. We mapped colluvial deposits in topographic hollows, most of which were unchanneled valleys upslope of channel heads. There are between 48 and 56 hollows in the mapped area (some unchanneled valleys bifurcate upslope of the channel head and some do not support a channel head). The total of 35 mapped landslides in hollows in the 10 yr since clearcutting yields a rate of 8 landslides km^{-2} yr^{-1} and an average recurrence interval for landsliding from a hollow of <20 yr. Considering only the 25 landslides that could not have been related to road drainage yields a rate of 5.8 landslides km^{-2} yr^{-1} and a recurrence interval of about 20 yr.

The erosion rate from landsliding on Mettman Ridge can be calculated from the 8700 m 2 surface area involved in the landslides shown in Figure 1. The landslides along Mettman Ridge are about 1 m thick and using a dry bulk density for the colluvial soil of 1.2 t m^{-3} to convert the volumetric soil loss to a sediment yield during the 10 yr monitoring period over the entire 0.43 km ^{2} area yields 2400 t km^{-2} yr^{-1}, which corresponds to a net lowering rate of 2.0 mm yr^{-1} . This contemporary lowering rate is more than an order of magnitude greater than the 0.1 mm yr^{-1} rate of soil production at Mettman Ridge calculated from cosmogenic radionuclide analysis of weathered bedrock and river sand (Heimsath, 1999) and the lowering rate of 0.07 mm yr^{-1} calculated from rates of hollow infilling (Reneau and Dietrich, 1991).

Background recurrence intervals for landsliding from hollows can be independently estimated from ^{14}C dating of charcoal from basal colluvium. Although landslide rates likely varied through the Holocene, basal colluvium dates constrain the time since the most recent landsliding. At Mettman Ridge, charcoal fragments collected from the base of a colluvial deposit in one of the hollows that failed during the monitoring period indicate ^{14}C ages of 660 ± 60 B.P. at the channel head and 4070 ± 90 B.P. in a soil pit upslope along the hollow axis. The younger date at the channel head could reflect either progressive infilling of a single original landslide scar from upslope, or a more recent failure of the channel head. Previously reported basal colluvium dates from hollows in the Oregon Coast Range span 1600 to >40000 B.P. (Benda and Dunne, 1987; Reneau and Dietrich, 1990). Discounting the >40000 B.P. date and adding our two dates to those reported previously yields a sample of 13 dates, with a mean of 5600 yr and a standard deviation of 2800 yr. Using the 3–8 k.y. range of recurrence intervals defined by one standard deviation from the mean ^{14}C date together with a typical range for hollow density of 80–100 hollows km^{-2} predicts a long-term hollow failure rate of 0.01–0.03 landslides km^{-2} yr^{-1} for the Oregon Coast Range, two orders of magnitude less than the observed contemporary rate at Mettman Ridge.

SLOPE STABILITY MODEL

In the Oregon Coast Range lateral root strength along the perimeter of a potential landslide provides the primary reinforcement because few roots penetrate into the underlying bedrock. The widely used infinite-slope stability model can be modified to account for lateral root strength (Riestenberg and Sovonick-Dunford, 1983; Burroughs, 1984; Reneau and Dietrich, 1987) and rearranged to solve for the critical proportion of the soil that must be saturated *(m_C)* to trigger slope failure:

$$m_C = \frac{C_l P z + C_b A}{A \rho_w g z \cos^2\theta \tan\phi} + \frac{\rho_s}{\rho_w}\left(1 - \frac{\tan\theta}{\tan\phi}\right), \qquad (1)$$

where θ is the local slope angle, C_l and C_b are the apparent lateral and basal cohesion due to both soil and root properties, ρ_s and ρ_w are the density of soil and water, g is gravitational acceleration, z is the soil thickness, ϕ is the friction angle of the soil, and A and P are the basal area and perimeter of the landslide. An m_C value greater than 1 indicates that pore-water pressure in excess of hydrostatic is required for landsliding. Assuming negligible basal root reinforcement for a small (10 × 5 × 1 m) landslide in the generally cohesionless soils of the Oregon Coast Range, m_C greatly exceeds 1 for most slopes for $C_l > 12$ kPa (Fig. 4). In the Oregon Coast Range, the apparent cohesion attributable to mature conifers is generally >10 kPa, whereas that attributable to cut stumps and understory is 2–4 kPa (Burroughs and Thomas, 1977; Schmidt, 1999). Hence, in a mature forest, landsliding should initiate only where local hydrologic conditions lead to pore pressures well above hydrostatic (Montgomery et al., 1997) or in local areas of low root strength. Notably, $C_l < 12$ kPa allows for slope instability at less than fully saturated conditions, which accounts for landsliding during low recurrence interval storms after timber harvest.

We extend this approach to predict locations susceptible to landsliding after timber harvest using a spatially distributed model that quantifies the topographic control on shallow landsliding by assuming infiltration of rainfall and topographically driven flow through soil over impermeable bedrock (Montgomery and Dietrich, 1994). Specifically, we assume that $m = qa/(Tb\sin\theta)$, where q is the effective precipitation (precipitation less evapotranspiration and deep drainage), a is the drainage area to a contour length b (here assumed to be the grid cell size), and T is the transmissivity (the vertical integration of the saturated hydraulic conductivity). This is a solution for steady state precipitation and runoff for shallow subsurface flow, which is assumed to follow the surface topography. The relative potential for shallow landsliding is given by the q/T required to generate instability:

$$(q/T)_c = \frac{\sin\theta}{(a/b)}\left[\frac{C_l Pz + C_b A}{A\rho_w gz\cos^2\theta\tan\phi} + \frac{\rho_s}{\rho_w}\left(1 - \frac{\tan\theta}{\tan\phi}\right)\right]. \qquad (2)$$

Values for $(q/T)_c$ are calculated for locations with slopes between those that will not fail even if saturated $\{\tan\theta < [(C_1 Pz + C_b A)/A\rho_s gz\cos^2\theta] + [1 - (\rho_w/\rho_s)]\tan\phi\}$ and those predicted to be unstable even when dry, and therefore considered unconditionally unstable areas $\{\tan\theta \geq \tan\phi + [(C1Pz + C_b A)/A\rho_s gz\cos^2\theta]\}$. Smaller values of $(q/T)_c$ indicate less rainfall needed for instability, and hence a greater potential for instability.

We used a 2 m grid digital elevation model (DEM), $\rho_s / \rho_w = 1.6$, $\phi = 33°$, and a landslide length of 10 m and width of 5 m in our Mettman Ridge simulations. Instead of predicting soil depth (Dietrich et al., 1995), we used a uniform soil depth of 1 m because detailed mapping revealed substantial local variability to soil thickness—likely due to tree throw and previous removal of colluvium by landsliding (Heimsath, 1999; Schmidt, 1999). The ϕ value of 33° is based on field measurements using a shear vane on in situ material at Mettman Ridge and previous published values for similar Oregon Coast Range soils (Yee and Harr, 1977; Schroeder and Alto, 1983). Although the parameters in equation 2 vary across a landscape and can be considered as having a distribution of values (Hammond et al., 1992), the spatial pattern of such variability is unpredictable. Consequently, we assign mean values and interpret variability in failure occurrence within a slope stability class as being due, in part, to the unknown spatial variance in site properties.

Assuming negligible basal root reinforcement, even high postlogging C_l of 4–6 kPa predicts large areas of Mettman Ridge to be potentially unstable, with the greatest hazard in steep, convergent topography (Fig. 1). As C_l increases, zones of potential instability become restricted to topographic hollows and disappear at $C_l > 12$ kPa. Mapped landslides at Mettman Ridge overlapped locations predicted to be unconditionally unstable at $C_l < 4$ kPa.

We can also compare (q/T) values for storms that triggered landslides at Mettman Ridge to the range of steady-state $(q/T)_c$ values predicted by equation 2. Falling head conductivity tests and soil depth profiles indicate that T = 65 m^2 day^{-1} at Mettman Ridge (Montgomery and Dietrich, 1994; Montgomery et al., 1997).Using the lower bound of 5 cm day^{-1} for the 24 hr rainfall observed to cause landslides at Mettman Ridge (Fig. 2) yields log(q/T) = –3.1, a value that corresponds to the minimum $\log(q/T)_c$ values within the footprint of Mettman Ridge landslides.

REGIONAL LANDSLIDING

We evaluated contemporary rates of shallow landsliding based on a regional set of 3224 landslides mapped during watershed analyses that covered 2993 km^2 of Oregon and Washington (Montgomery et al., 1998). These watersheds provide a representative sampling of industrial forest lands in the region; they encompass a wide range of topographic and geologic settings in glaciated and unglaciated terrain, and all of the watersheds had been logged over the periods of record.

We used maps of landslides compiled from aerial photographs during watershed analyses conducted by a private timber company using coverage from the earliest available (typically from the 1940s) to the most recent (generally the 1990s). Our own examination of selected aerial photographs and landslide maps from several of the watershed analyses revealed that many small landslides were not mapped. Due to this underrepresentation and because aerial photograph analyses further undercount landslide frequencies under a forest canopy (Robison et al., 1999), this regional compilation provides a minimum rate for historic landsliding. Note, however, that road-related landslides account for about half of the mapped landslides (Montgomery et al., 1998).

In four of the watersheds, we used a 10 m grid DEM based on scanned contours from U.S. Geological Survey (USGS) 7.5' topographic quadrangles. In the other watersheds we used USGS 30 m grid DEMs. To avoid the complication of variable landslide sizes in a regional analysis and isolate the topographic control on landslide initiation, we used $\rho_s / \rho_w = 1.6$, $C_l = 0$,

$C_b = 2$ kPa, $z = 1$ m, and $\phi = 33°$ for all of the watersheds. Each mapped landslide was assigned to the minimum $(q/T)_c$ value predicted within its boundary. Because this approach introduces a bias toward low $(q/T)_c$ values, we conducted 10 simulations of an equivalent number of randomly placed landslides of comparable size for each watershed. These biased random simulations allow an independent test of model performance because if the model correctly identifies areas of greater landslide initiation potential, then we should observe higher rates of sliding in high hazard, low $(q/T)_c$ terrain than in the analysis of randomly placed slides.

The aggregated data set for all 14 watersheds reveals an inverse relation between $(q/T)_c$ and landslide density in potentially unstable portions of the landscape (Fig. 5), confirming that shallow landslides tend to occur in areas predicted to have low $(q/T)_c$ values. Comparison of mapped landslide frequencies with the randomly placed landslides reveals that landslides occurred two to three times more frequently than predicted by the random model for $\log(q/T)_c \leq -2.8$, but that for locations with $\log(q/T)_c > -2.2$ factors other than the topographic control embodied in equation 2 must dominate landslide initiation. As terrain with $\log(q/T)_c < -2.8$ occupies only 13% of the total area of the study watersheds, the greatest landslide hazard is restricted to a small and topographically identifiable portion of the region.

A minimum regional constraint on the contemporary rate of sliding from hollows is the rate in areas where $\log(q/T)_c \leq -2.8$, sites that at the 10–30 m grid scale of our analysis typically correspond to areas with well-developed topographic hollows. Dividing the aggregated 4.7 landslides km^{-2} observed for all areas where $\log(q/T)_c \leq -2.8$ by the 50 yr time period spanned by the aerial photograph records yields 0.09 landslides $\text{km}^{-2}\,\text{yr}^{-1}$, or 3 to 9 times the background rate estimated here for the Oregon Coast Range (0.01–0.03 landslides $\text{km}^{-2}\,\text{yr}^{-1}$).

CONCLUSIONS

Our unique 10 yr record of landsliding from steep, slide-prone terrain and analysis of an extensive regional landslide survey document a discrepancy between contemporary and longer term rates of shallow landsliding in the Pacific Northwest. Together these complementary lines of evidence confirm that forest clearing increases regional landslide frequency. Our data from Mettman Ridge further show that small landslides triggered during common storms, and therefore overlooked by conventional monitoring, can dramatically increase sediment yield. Mettman Ridge is located in some of the steepest and least stable terrain in the Oregon Coast Range, and should have one of the highest landslide rates in the region. Therefore the dramatic acceleration of contemporary landslide rates at Mettman Ridge is not representative, but rather provides an estimate of the maximum impact in landslide-prone terrain in the region. However, the regional analysis, which provides a minimum estimate due to its reliance on aerial photograph interpretation, reveals a rate of three to nine times background rates for the region as a whole. The magnitude of the impact, however, should vary with local geology, storm history, and land-use practices. Our analysis also supports the hypothesis that at high apparent cohesion, landslides in steep terrain are restricted to locations with either excess pore pressures or thick soils (e.g., topographic hollows), but that landsliding occurs more widely across the landscape in areas with low apparent cohesion. This fundamental change in landscape dynamics is particularly relevant to long-term forest planning, especially where urban areas are extending into landslide-prone terrain.

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Printed in U.S.A.
GEOLOGY, April 2000

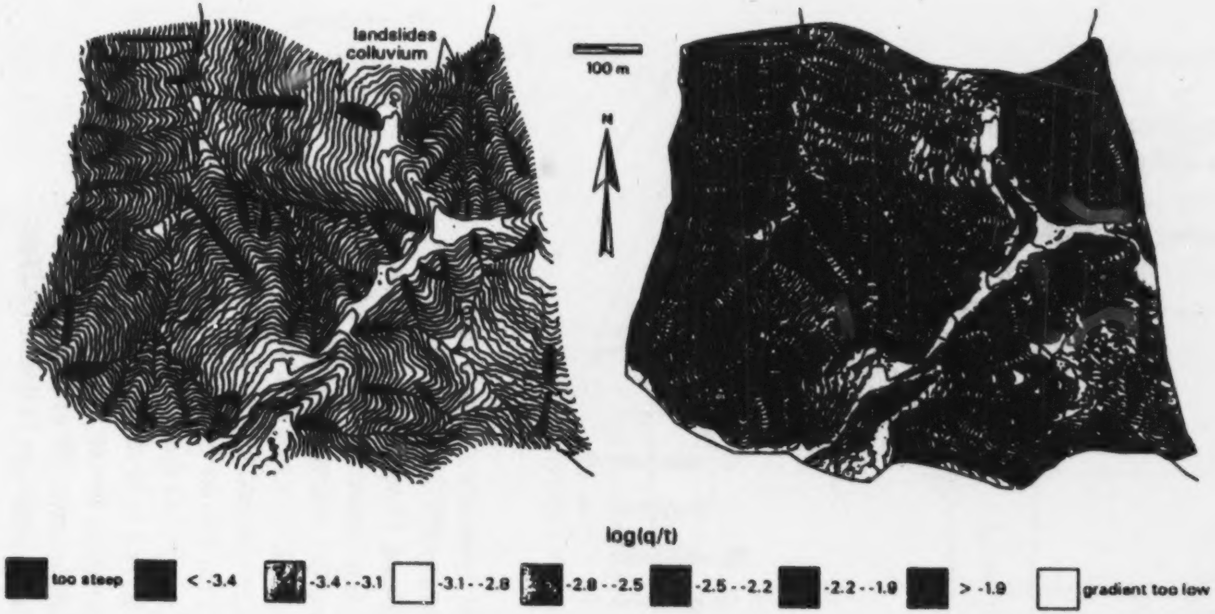

Figure 1. Mapped channel network (blue lines), colluvial fills in topographic hollows, and landslides that occurred from 1987 to 1997 on Mettman Ridge, Oregon. Base map is derived from laser altimetry survey in which average data spacing was 2.5 m, with estimated 0.3 m vertical uncertainty; contour interval is 5 m. Predicted $(q/T)_c$ values defined by equation 2 for $C_b = 0$, and $C_l = 6$ kPa (see text).

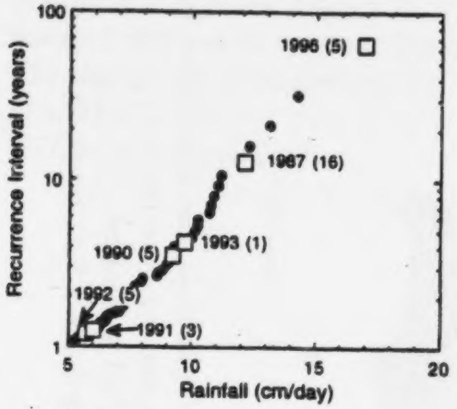

Figure 3. Recurrence intervals for 24 hr rainfall based on North Bend, Oregon, rain gauge for 1931 through 1996. Squares designate years (first number) during which landslides were mapped in study area and second number (in parentheses) is number of landslides during that year.

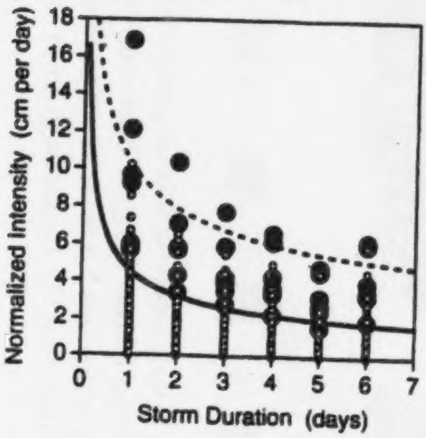

Figure 2. Rainfall intensity versus storm duration for January 1987 to March 1998 based on North Bend, Oregon, rain gauge. Large dots represent storms in periods during which debris flows were triggered at Mettman Ridge; smaller open circles represent all other storms. Upper dashed line is Caine's (1980) threshold for debris-flow initiation based on global data compilation; I = 14.8D–0.39, where I is intensity (mm/hr) and D is duration (hr); lower solid line is relation with similar form fit to lower bound of slide-producing storms at Mettman Ridge; $I = 9.9D^{-0.52}$.

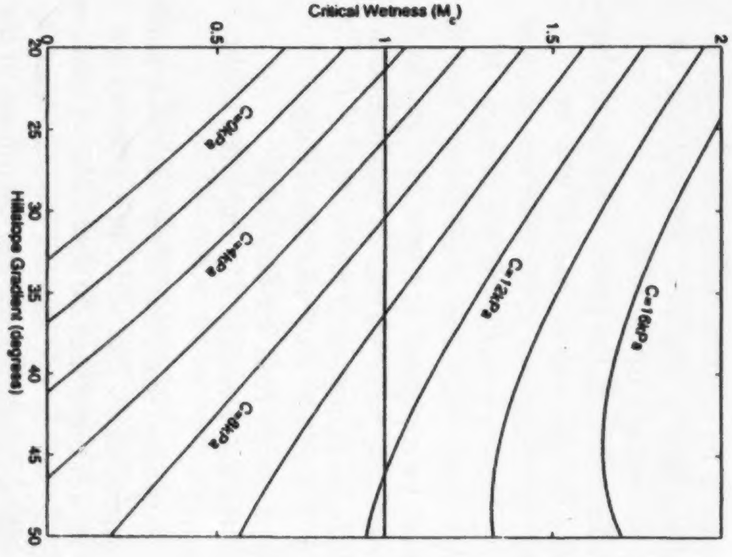

Figure 4. Critical wetness, mc, defined by equation 1 versus ground slope for C_l of 0–16 kPa, $C_b = 0$, $\rho_s/\rho_w = 1.6$, $\phi = 33°$, $z = 1$ (see text), and landslide length of 10 m and width of 5 m..

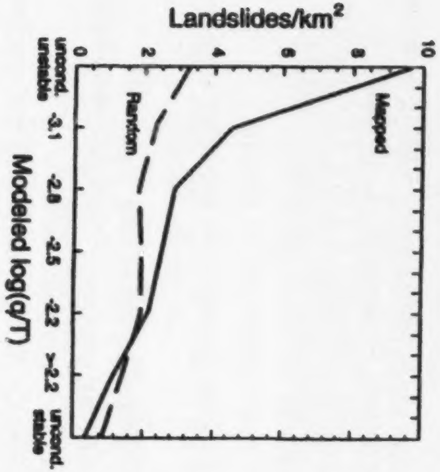

Figure 5. Mapped regional landslide rate based on 3224 landslides in Oregon and Washington and aggregated results of simulations of equal number of randomly placed landslides stratified by $(q/T)_c$ (see text).

Appendix K

ORS 376.105 through ORS 376.145:Oregon Ruling Statutes for Petitioner's Way of Necessity (Appendix A, Plaintiff's Opening Brief, Oregon Court of Appeals). 8 1/2 x 11 Original necessitated this retyped verbatim copy to conform with U.S. S.Ct. Rules 33-(b),33-(c)

(OREGON) STATUTORY WAYS OF NECESSITY

ORS 376.105 Petition to establish way; appointing viewers; notifying owners. Whenever it appears to any county court by the sworn petition of any person that the farm or residence of such person is not reached conveniently by any public road provided by law, and that it is necessary that the public and such person have ingress to and egress from the farm or residence of such person, the county court shall:

(1)Appoint a board of county viewers.

(2)Cause an order to be issued directing the viewers to meet at a time therein specified, not less than 10 days from the making of the order.

(3)Make an order notifying the person owning the land across which the roadway or gateway is to be established, notifying him of the time and place of the meeting, if he is a resident of the county. If such person is not a resident of the county then the meeting shall be appointed at a later date and four weeks' notice shall be given him by publication in some newspaper published in the county.

ORS 376.110 Locating way and assessing damages. The board of county road viewers shall:

(1) Meet upon the day mentioned in the order of the county court.

(2) View out, locate and mark out either a suitable public road not exceeding 60 feet wide, or a gateway not less than 10 nor more than 30 feet wide, or both, as may be found best by the viewers, having regard to all surrounding circumstances and conditions of the case and so as to do the least damage to the land

through which the road or gateway is located, from the farm or residence of such person to the nearest point practicable on another public road, gateway, steamboat landing or railroad station.

(3) Assess the damages sustained.

(4) Make a report to the county court at its next regular session of the public road or gateway located, the amount of damages assessed and the persons entitled to such damages.

ORS 376.115 Answer of owner; trial of issues; establishment of way.

(1)Any person owning land across which a roadway or gateway is sought to be established under ORS 376.105 and 376.110 may file and answer:

(a) Controverting any allegation of the petition or report of the viewers; and

(b) Alleging any new matter calculated to defeat the proceeding, which allegations may be controverted by the petitioner.

(2) The issues formed shall be tried by the county court.

(3) If the county court is satisfied that the report of the viewers is just, it shall, after payment within 20 days by the petitioner of the costs of the viewers and the damages assessed, order the report to be confirmed and recorded as such, and declare the road or gateway to be a public road or a perpetual right of way.

ORS 376.120 Appeal from county court.

(1) Either the petitioner for the road or the landowner may appeal from the decision of the county court upon the issues mentioned in ORS 376.115 to the cirdcuit court within 20 days after the confirmation of the report of the viewers.

(2) Any person aggrieved by the assessment may appeal to the circuit court within 20 days after the confirmation of the report of the viewers.

(3) In case a landowner appeals from both an assessment of damages and from the decision of the county

court upon the issues mentioned in ORS 376.115, the appeals shall be combined.

ORS 376.125 Procedure when land state-owned.

(1) Whenever it appears to the county court in any proceeding for the establishment of a roadway or gateway pursuant to ORS 376.105 to 376.135, that the land on or over which the roadway or gateway is to be established is owned by the state, a copy of the petition for establishment, accompanied by a copy of the order of the county court giving notice of the time and place of meeting of the board of county road viewers, shall be forwarded by registered mail to the Secretary of State and like copies to the officer, board, commission, department or institution of the state having the use or control of such land, at least four weeks prior to the date of the meeting.

(2) Upon filing in the office of the county clerk satisfactory proof by affidavit of the mailing of such copies, the county court has jurisdiction over such lands to the same extent as land in private ownership.

(3) The roadway, gateway or both may be established on or over the state-owned land by the procedure and to the extent prescribed by ORS 376.105 to 376.135, except that a copy of the report of the viewers shall be served upon the state agency having use or control of such land, or its attorney appearing in the proceeding, not less than 10 days prior to final determination by the county court, and an opportunity shall be given to be heard thereon.

ORS 376.130 Opening, maintaining, altering and vacating way.

(1) Public roads or rights of way mentioned in ORS 376.110 shall be opened and kept passable by the person applying for them.

(2) No such road or public easement shall be altered or vacated except by the county court in the manner provided by law.

(3) No county shall be bound to work, improve or keep in repair such road or public easement.

ORS 376.135 Notice before closing way. No person, firm, or corporation shall close, fence, obstruct or attempt to close, fence, obstruct or in any manner interfere with the free use of any roadway which is now being and has been continuously used and traveled for more than 10 years as a means of ingress and egress from the farm or residence of such person who is or has been threatened with such closure, without first giving notice in writing of his intention to close, fence or obstruct such roadway at least 60 days prior to such closing to the persons using the roadway.

ORS 376.140 [Repealed by 1971 c.743 $432].

ORS 376.145 Franchise for logging way upon the way of necessity.

(1) The county court of any county may, if in its judgment deemed proper and to the best interests of the publis, upon such terms, in such manner and for such time, not exceeding 10 years, as it may determine, upon the petition of any person or corporation engaged in logging, grant such person or corporation a franchise to construct and maintain in and upon any road mentioned in ORS 376.110 in the county a logging road, skid road, logging railroad, chute, tramway or track, suitable for hauling or transporting logs, timber or lumber thereon.

(2) Any such logging road, skid road, logging railroad, chute, tramway or track shall:

(a) Be at the expense of the petitioner.

(b) Be removed at the expense of the petitioner, upon the expiration or sooner termination of the franchise.

Appendix L

ORS 376.150 through ORS 376.200:Oregon Current Statutes for Way of Necessity, verbatim, downloaded from online site www.leg.state.or.us/ors376.html (1999 ed.) on 10/20/2001. 8 1/2 x 11 Original necessitated this reedited verbatim copy to conform with U.S. S.Ct. Rules 33-(b), 33-(c).

376.105 [Repealed by 1979 c.862 s.12]
376.110 [Repealed by 1979 c.862 s.12]
376.115 [Repealed by 1979 c.862 s.12]
376.120 [Repealed by 1979 c.862 s.12]
376.125 [Repealed by 1979 c.862 s.12]
376.130 [Repealed by 1979 c.862 s.12]
376.135 [Repealed by 1979 c.862 s.12]
376.140 [Repealed by 1971 c.743 s.432]
376.145 [Repealed by 1979 c.862 s.12]

STATUTORY WAYS OF NECESSITY

376.150 Definitions for ORS 376.150 to 376.200. As used in ORS 376.150 to 376.200:
(1) "Public road" means the entire right of way of any road over which the public has the right of use or any right of way held by the state or a political subdivision of the state for road purposes that is not open for public use.
(2) "Way of necessity" means:
(a) A road established under ORS 376.150 to 376.200 to provide motor vehicle access from a public road to land that would otherwise have no motor vehicle access; or
(b) A route established under ORS 376.150 to 376.200 to provide utility service access from an existing service location to a service point that would otherwise have no utility service access. [1979 c.862 s.1; 1989 c.674 s.1]

376.155 Petition to establish way of necessity; contents; requirements. (1) To establish a way of necessity under ORS 376.150 to 376.200, a landowner shall file a petition with the governing body of the county in which the land is located.

(2) A petition filed under this section shall con[illegible] drawing and a narrative statement that contain all of the [illegible]lowing information:

(a) The location and legal description of the property to be served by the proposed way of necessity.

(b) The location of all public roads located in the vicinity of the property to be served by the proposed way of necessity that are capable of being used to provide access to the property. The petition shall include the location of public roads that are not open for public use.

(c) A specific proposed location for the proposed way of necessity.

(d) Evidence showing the necessity for the establishment of a way of necessity.

(e) Evidence that either:

(A) The proposed way of necessity does not connect to a public road that has access rights acquired and limited by the state or county; or

(B) If the public road proposed for access by way of necessity has the limited access rights, the state or county is willing to grant permission to connect the proposed way of necessity to the public road.

(f) Evidence that the proposed way of necessity may be connected to the public road safely.

(g) Evidence that the specific location proposed for the way of necessity is the nearest practicable point for connection to a way of necessity to a public road.

(h) The names and addresses of the persons owning the land across which the way of necessity could be located.

(i) The petitioner's proposal for the amount of compensation to persons owning land across which the way of necessity is proposed to be located.

(j) Evidence that the petitioner does not have an existing easement or right to an easement to provide access to a public road.

(k) Evidence that the petitioner does not have any enforceable access to a public road. [1979 c.862 s.2; 1991 c.936 s.2]

376.160 Notice to landowners; investigation of proposed way; report to county governing body. (1) Upon

receipt of a petition for a way of necessity filed under ORS 376.155, a county governing body shall:
(a) Provide for service of the petition on all persons owning land across which the way of necessity could be located; and
(b) Direct the county engineer, county surveyor or other persons appointed by the governing body to investigate the proposed way of necessity and to submit a written report to the county governing body.
(2) The report under subsection (1) of this section shall include:
(a) Possible alternate routes for ways of necessity to the property;
(b) A determination of whether the proposed way of necessity meets the requirements under ORS 376.150 to 376.200;
(c) The reasonableness of the way of necessity proposed in the petition; and
(d) A recommendation for a specific location and width for a way of necessity.
(3) Upon receipt of the report under subsection (2) of this section, the county governing body shall:
(a) Provide a copy of the report to the petitioner; and
(b) Serve a copy of the petition and report on all persons owning land across which the way of necessity is proposed to be located under the report or the petition.
(4) Service of the petition and report under this section shall be accomplished in the manner provided for service of summons in an action at law. If the report includes a recommendation for a route different than the route proposed in the petition, service on the affected parties shall include a copy of the petition. [1979 c.862 s.3]

376.165 Deposit to cover county expenses. Upon receipt of a petition for a way of necessity filed under ORS 376.155, a county governing body may require the petitioner to deposit with the county an amount of money or other security to use for payment of county expenses incurred in the procedure for establishing the way of necessity or to assure that the expenses will be paid. If a deposit of money is required by the governing body, the deposit may be used to pay expenses and shall be deducted from the expenses ordered to be paid under ORS 376.175. [1979 c.862 s.3a]

376.170 Filing of answer by landowner; reply to answer by petitioner. (1) Any person owning land across which a way of necessity is proposed to be established under ORS 376.150 to 376.200 may file an answer controverting any matter in the petition or report and alleging any new matter relevant to the proceedings. An answer filed under this subsection must be filed within 30 days after receipt of service of the petition and report. An answer shall be filed with the county governing body. The county governing body shall provide for service of the answer upon the petitioner in the manner provided for service of summons in an action at law.
(2) If an answer is filed under this section, the petitioner may file a reply controverting any matter presented in the answer. A reply filed under this section must be filed within 10 days after receipt of service of the answer by the petitioner. A reply shall be filed with the county governing body. The county governing body shall provide for service of the reply upon the person filing the answer in the manner provided for service of summons in an action at law. [1979 c.862 s.4]

376.175 Order granting or denying way of necessity; contents; liability for costs; appeal. (1) Upon consideration of the matters and issues presented under ORS 376.150 to 376.200, the county governing body shall determine whether or not a need has been demonstrated for the granting of a way of necessity under ORS 376.150 to 376.200 and shall enter an order granting or denying the way of necessity.
(2) Any order entered under this section shall:
(a) State whether the way of necessity is granted or denied;
(b) Declare as established any way of necessity that is granted;
(c) Describe the exact location and width of any way of necessity established;
(d) Describe those uses that are permitted on any way of necessity established;
(e) Direct the petitioner to pay costs and reasonable attorney fees incurred by each owner of land whose land was subject to the petitioner's action for a way of necessity under ORS 376.150 to 376.200;

(f) Establish the amount of compensation due to any owner of land across which any way of necessity has been established and direct the petitioner to pay the compensation; and

(g) Establish the costs incurred by the county in the procedures for the way of necessity under ORS 376.150 to 376.200 and direct the petitioner to reimburse the county for those costs not already paid by petitioner.

(3) An order entered under subsections (1) and (2) of this section to provide for utility service, as set forth in ORS 376.150 (2)(b), shall conform to affected utility policy and standards.

(4) A petitioner shall pay any costs the petitioner is directed to pay under an order issued under this section within 60 days after entry of the order. The petitioner is liable for any costs not paid within the time established in this subsection. If more than one landowner joins in a petition for a way of necessity under ORS 376.155, every petitioner granted use of the way of necessity shall be jointly and severally liable for any costs ordered to be paid.

(5) Any party to the action for a way of necessity may contest any part of the order of the county governing body in an appeal filed with the circuit court within 30 days after entry of the order of the county governing body. [1979 c.862 s.5; 1989 c.674 s.2; 1991 c.936 s.3]

376.180 Conditions for way of necessity. A way of necessity established under ORS 376.150 to 376.200 shall:

(1) Be located to cause the least possible damage to land across which it is located;

(2) Be fenced or gated if required by the county governing body;

(3) Not be connected to a public road in a location or manner that creates a traffic hazard or decreases the safety on the public road;

(4) Be established only for uses in connection with the property for which the way of necessity is sought;

(5) Not be subject to any use that is not described in the order establishing the way of necessity;

(6) Not exceed 30 feet in width unless authorized by the county governing body for engineering purposes;

(7) Not be connected to a public road where the rights of access to the road have been acquired by the state or a county unless the state or governing body of the county grants permission for the connection;

(8) Not be established if the property for which the way of necessity is sought has an existing enforceable access to a public road;

(9) Not be established if the petitioner for the way of necessity could acquire an easement for access to a public road through other legal action;

(10) Not be established for land that has been subdivided or partitioned in violation of ORS chapter 92;

(11) Not be established over land owned by the state or a political subdivision of the state unless permission is granted for the way of necessity under ORS 376.185; and

(12) Not be established for any land if the owner of the land had knowingly eliminated access to all public roads from the land by the sale of other land owned by the landowner. [1979 c.862 s.6; 1991 c.936 s.5; 1993 c.18 s.91]

376.185 Way of necessity over public land. (1) A way of necessity may not be established under ORS 376.150 to 376.200 across land owned by the state or a political subdivision of the state without the consent of the governing body of the political subdivision or of the appropriate agency of the state. The governing body of a political subdivision of this state and any agency of the state shall not unreasonably withhold consent required under this subsection.

(2) Whenever a way of necessity is sought over land owned by the state or a political subdivision of the state, a copy of the petition for the way of necessity, of the county report and of the notice of hearing shall be forwarded by certified mail to:

(a) If the political subdivision owns the land, the governing body of the political subdivision.

(b) If the state owns the land, to the Division of State Lands and to each agency of the state that has use or control of the land. [1979 c.862 s.7; 1993 c.98 s.17]

376.190 Responsibility for maintenance of way of necessity; alteration limited. (1) A way of necessity that is established under ORS 376.150 to 376.200 shall be maintained and kept passable by the person owning the land for which the way of necessity is established. This subsection does not require the person to provide for maintenance of the way of necessity for uses or persons not specifically provided in the order establishing the way of necessity.

(2) A way of necessity established under ORS 376.150 to 376.200 shall not be altered or vacated except by the governing body of the county in which it is located and in a manner provided by law for the alteration or vacation of a public road.

(3) No county shall be required to work, improve, maintain or repair a way of necessity. [1979 c.862 s.8; 1991 c.936 s.5]

376.195 Subsequent partition of land receiving way of necessity requires government approval. Land for which a way of necessity is established under ORS 376.150 to 376.200 shall not be subsequently partitioned without the approval of the city or county governing body which has partitioning authority. [1979 c.862 s.9]

376.197 Way of necessity to historic cemeteries. Notwithstanding any other provision of ORS 376.150 to 376.200, a way of necessity for nonmotorized conveyance is established to any parcel that meets the criteria described in ORS 308A.125. [1999 c.314 s.46]

376.200 Transfer of jurisdiction over establishment of ways of necessity to circuit court; local court rules; procedure after transfer. (1) Notwithstanding any provision of ORS 376.150 to 376.200, a county governing body may adopt an ordinance removing the county governing body from jurisdiction over the establishment of ways of necessity under ORS 376.150 to 376.200.

(2) If the county governing body adopts an ordinance described in subsection (1) of this section, the circuit court of that county shall have jurisdiction of the establishment of ways of necessity for that county. Except as otherwise provided in this section, a court with jurisdiction of the establishment of ways of necessity under this section shall follow the procedures for establishment of a way of necessity provided under ORS 376.150 to 376.200. The court may adopt local court rules to supplement the procedures provided under ORS 376.150 to 376.200.

(3) Notwithstanding ORS 376.175, if jurisdiction for establishment of ways of necessity is in the circuit court as provided under this section, an appeal from the decision of the court shall be to the Court of Appeals.

(4) Notwithstanding ORS 376.160 (1), if jurisdiction for establishment of ways of necessity is in the circuit court as provided under this section, upon filing a petition the petitioner shall:

(a) Provide for service of the petition on all persons owning land across which the way of necessity could be located; and

(b) Post a bond or security deposit with the court clerk in an amount required by the court to pay for the cost of the investigation and report under subsection (5) of this section.

(5) If jurisdiction for establishment of ways of necessity is in the circuit court as provided under this section, upon receipt of a petition the court shall appoint a person to investigate the proposed way of necessity and submit a written report to the court and the petitioner. The cost of the investigation and report shall be charged against the bond or security deposit posted under subsection (4) of this section. If the bond or security deposit is more than the actual cost of the investigation and report, the difference shall be refunded to the petitioner. If the bond or security deposit is less than the actual cost of the investigation and report, the petitioner shall pay to the county governing body the amount of the deficiency. A judgment of the court shall not become final until the full cost of the investigation and report has been paid.

(6) Notwithstanding ORS 376.160 (3), if jurisdiction for establishment of ways of necessity is in the circuit court as provided under this section, upon receipt of the report under subsection (5) of this section, the petitioner shall serve a copy of the petition and report on all persons owning land across which the way of necessity is proposed to be located under the petition or report. [1979 c.862 s.10; 1995 c.265 s.1]

376.205 [Repealed by 1981 c.153 s.79]

376.210 [Repealed by 1981 c.153 s.79]

376.215 [Repealed by 1981 c.153 s.79]

376.220 [Repealed by 1981 c.153 s.79]

Appendix M

Oregon Trial Court Exhibit 7: Letter from Defendants to Petitioner
8 1/2 x 11 Original necessitated this retyped verbatim copy to conform with U.S. S.Ct. Rules 33-(b), 33-(c).

4-11-97

Dear Nan,

We want to inform you that our logging operation in the area of your Statutory Way of Necessity will begin on April 12,1997. There will be occassional delays on the road. If you have any scheduled appointments we would be glad to work around them.

Please let us know. We will be happy to cooperate with you on this matter.

Sincerely,

(signatures)
Sheryl Haddock
Paul Haddock
Susan Callahan

Appendix N:Chronological Summary of (Appeal Reply Brief,APP-B) Citations' Elements

Citations (* = quoted in def. response brief) Year...State/Court Supreme (S) Appeals (A)	Who Pays Compen-sation	Who Pays Construc-tion	Who Pays Mainte-nance	Who is Liable	Public Use	Constitu-tional Test Cited	Legal Basis for Creation
Cragie v. Mellen and others 1809 MA/S	Town	Town	Town	Town	Yes	Public $, Public Use	1792 Statute
Metcalf v. Bingham 1826 NH/S	Private Pty Petitioner	Town	Town	Town	Yes	Public Use	Prov. Laws
Jones v. Inhabitants of Andover 1827 MA/S	?	Town	Private Pty /Town	Private Pty / Town	Yes	Public Use	Statute 1786
Parks v. City of Boston 1829 MA/S	Mostly the town	Town	Town	Town	Yes	Public $, Public Use	Statute 1786
In the Matter of Albany Street 1834 NY/S	Corp.N.Y.	Corp.N.Y	Corp.N.Y	Corp. N.Y.	Yes	Take only enough	Statute,

Appendix N:Chronological Summary of (Appeal Reply Brief,APP-B)Citations' Elements (2)

Citations (* = quoted in def. response brief) Year...State/Court Supreme (S) Appeals (A)	Who Pays Compen-sation	Who Pays Construc-tion	Who Pays Mainte-nance	Who is Liable	Public Use	Constitu-tional Test Cited	Legal Basis for Creation
Taylor v. Porter 1843 NY/S	Petitioner	Town	Town	Town	Yes	Public Use	Const. 1789
Shaver v. Starrett 1855 OH/S	Private Pty Petitioner	Private Pty Petitioner	Private Pty Petitioner, successors	Private Pty	Yes	Public Use	Statute
Talbot v. Hudson (mill acts) 1860 MA/S	The State	N/A	N/A	Can't sue	Yes	Public Use	Statute 1858
Flagg v. Flagg 1860 MA/S	Public/pvt.	Town	Town	Can't sue	Yes	Public Use	Statute 1786
Sherman v. Buick 1867 CA/S	Private Pty Petitioner	Private Pty Petitioner	Private Pty Petitioner, successors	Private Pty	Yes	Public Use	Statute

Appendix N:Chronological Summary of (Appeal Reply Brief,APP-B)Citations' Elements (3)

Citations (* = quoted in def. response brief) Year...State/Court Supreme (S) Appeals (A)	Who Pays Compensation	Who Pays Construction	Who Pays Maintenance	Who is Liable	Public Use	Constitutional Test Cited	Legal Basis for Creation
Denham & others v. County Commissioners of Bristol 1871 MA/S	Private Pty Petitioner	Town	Town	Town	Yes	Public Use	Gen. Sts.
* Witham v. Osburn 1873 OR/S	Pvt. funds 4 pvt. road	Pvt. funds 4 pvt. road	Pvt. funds 4 pvt. road	Pvt. pty	No	Public Use Necessary	Ch.50,S.15-17, voided
Herman v. Roberts 1890 NY/A	Private Pty	Private Pty	Private Pty	Private Pty	No	Not applic	Pvt. contract
Latah County v. Peterson 1892 ID/S	Private Pty Petitioner	Private Pty Petitioner	Private Pty Petitioner, successors	Private Pty	Yes	Public Use	IRS 933

Appendix N:Chronological Summary of (Appeal Reply Brief,APP-B) Citations' Elements(4)

Citations (* = quoted in def. response brief) Year...State/Court Supreme (S) Appeals (A)	Who Pays Compensation	Who Pays Construction	Who Pays Maintenance	Who is Liable	Public Use	Constitutional Test Cited	Legal Basis for Creation
* Towns v. Klamath County 1898 OR/S	Private Pty Petitioner	Private Pty Petitioner	Private Pty Petitioner, successors	Private Pty.	Yes	Public Use	Hill's Annot. Laws
* Van Natta v. Nys and Erickson 1954 OR/S	Not applic.	Pvt. owners	Pvt. by use	Pvt. owners	NO	Not applic.	CJS
Major et al v. Douglas County 1971 OR/A	Public	Public	Public	Public	Toll Rds. OK	Public Use	ORS 368.805
* Aylett v. Mardis 1982 OR/A	Private Pty Petitioner.	Private Pty Petitioner	Private Pty Petitioner, successors	Private Pty	Yes	Public Use	ORS 376.105

Appendix N:Chronological Summary of (Appeal Reply Brief,APP-B) Citations' Elements(5)

Citations (* = quoted in def. response brief) Year...State/Court Supreme (S) Appeals (A)	Who Pays Compen-sation	Who Pays Construc-tion	Who Pays Mainte-nance	Who is Liable	Public Use	Constitu-tional Test Cited	Legal Basis for Creation
* Chapman v. Perron 1984 OR/A	Private Pty Petitioner	Private Pty Petitioner.	Private Pty Petitioner, successors.	Private Pty	Yes	Public Use	ORS 376.150
* Schoeneman v. Meyer 1986 OR/A	Private Pty Petitioner.	Private Pty Petitioner.	Private Pty Petitioner, successors	Private Pty	Yes	Public Use	ORS 376.105
Mundy v. Priday 1997 OR/A	Private Pty Petitioner.	Private Pty Petitioner.	Private Pty Petitioner, successors	Private Pty	Yes	Public Use	ORS 376.150